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SHOW PROCEEDINGS AND ORDERS DATE: [05/31/89]

CASE NBR: [88106065] CSY STATUS: [ ]
SHORT TITLE: [Hildwin, Paul C.]
VERSUS [Florida] DATE DOCKETED: [120788]
PAGE: [01]

DATE	NOTE	PROCEEDINGS & ORDERS
Dec 7 1988		Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
Jan 4 1989		Order extending time to file response to petition until January 17, 1989.
Jan 17 1989		Brief of respondent Florida in opposition filed.
Jan 26 1989		DISTRIBUTED. February 17, 1989
Mar 26 1989		REDISTRIBUTED. May 11, 1989
May 12 1989		REDISTRIBUTED. May 18, 1989
May 19 1989		REDISTRIBUTED. May 25, 1989
May 30 1989		Petition GRANTED. Judgment AFFIRMED. Dissenting opinion by Justice Brennan. Dissenting opinion by Justice Marshall. Opinion per curiam.

1pp

88-6066

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

ORIGINAL

PAUL C. HILDWIN
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH CIRCUIT OF FLORIDA

LARRY B. HENDERSON
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Counsel for Petitioner

QUESTIONS PRESENTED

WHETHER IN PROFFITT V. FLORIDA THIS COURT RESOLVED EVERY POSSIBLE CONSTITUTIONAL CHALLENGE THAT COULD EVER BE MADE AGAINST FLORIDA'S DEATH PENALTY PROCEDURE?

WHETHER FLORIDA'S DEATH SENTENCING PROCEDURE VIOLATES THE SIXTH AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

WHETHER, ONCE A PERSON HAS BEEN FOUND GUILTY OF A CRIME THE STATE MAY IN IMPOSING THE DEATH PENALTY DECREASE THE DUE PROCESS PROTECTIONS AFFORDED BY THE SIXTH AND FOURTEENTH AMENDMENTS?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

PAUL C. HILDWIN
Petitioner,

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STATE OF FLORIDA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

Petitioner, Paul C. Hildwin, prays that the Supreme Court grant a writ of certiorari to review the judgment of the Supreme Court of Florida entered in this proceeding on September 1, 1988.

OPINION BELOW

The opinion of the Florida Supreme Court, reported as Hildwin v. State, 13 FLW 519 (Fla. September 1, 1988), is appended hereto as Appendix "A".

JURISDICTION

The judgment of the Florida Supreme Court, entered September 1, 1988 affirmed a conviction of first-degree murder and sentence of death. A Motion for Rehearing was denied and the decision became final on October 17, 1988. Jurisdiction of this Court exists under 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case concerns violations of the Sixth and Fourteenth Amendments to the United States Constitution. The pertinent Florida Statutes, §§782.04 and 921.141, Fla. Stat. (1987) are appended hereto as Appendix "B".

STATEMENT OF THE CASE

The body of a forty-two-year-old woman was found in the trunk of her car which had been abandoned in a wooded area. Following trial a twelve person jury found Paul C. Hildwin, Jr. guilty of the first-degree murder based solely on circumstantial evidence. Hildwin testified in his own behalf and denied committing the crime. The underlying basis of the verdict (premeditated and/or felony murder) was not specified (Appendices C & D). The next day, following a separate penalty trial, the same jury unanimously recommended a death sentence (Appendices E & F). The underlying basis of that recommendation was also unspecified.

At the sentencing proceeding, the trial judge found the existence of four statutory aggravating circumstances, to wit: 1) the murder was committed for pecuniary gain; 2) the murder was committed in an especially heinous, atrocious or cruel manner; 3) Hildwin was previously convicted of another violent felony, and; 4) Hildwin was under sentence of imprisonment when the murder occurred. The trial judge set forth in writing the facts, as perceived by him, that established these statutory aggravating factors (Appendix G).

On direct appeal, Hildwin argued that Florida's death penalty sentencing procedure violated the Sixth and Fourteenth Amendments to the United States Constitution, in that the aggravating factors set forth in Section 921.141(5) Florida Statutes are substantive elements of the crime which authorize imposition of the death penalty. (Point IV, Initial Brief of Appellant). The Supreme Court of Florida summarily rejected this argument without discussion. Hildwin v. State, 13 FLW 528, 530 (Fla. Sept. 1, 1988).

REASONS FOR GRANTING THE WRIT

ARGUMENT

Whether Florida's Death Penalty Sentencing Procedure Violates the Sixth and Fourteenth Amendments to the United States Constitution?

Hildwin contends that Florida's death penalty system violates his Sixth Amendment right to a jury where the existence of statutory aggravating factors is determined by trial judge rather than by jury. The Sixth Amendment right to have the jury determine the existence of statutory aggravating factors which authorize imposition of the death penalty in Florida is a distinct fundamental right neither raised by the parties nor addressed by this Court in Proffitt v. Florida, 428 U.S. 242 (1976), where this Court rejected a claim that imposition of a death sentence constituted cruel and unusual punishment under the Eighth and Fourteenth Amendments and held, "On its face the Florida system thus satisfies the constitutional deficiencies identified in Furman v. Georgia, 408 U.S. 238 (1972)." Proffitt, 428 U.S. at 253. This challenge is different from the one made in Proffitt.

Hildwin contends that Due Process under the Fourteenth Amendment requires the jury in Florida to find the existence of statutory aggravating factors because the factors are substantive, in that: 1) at least one statutory aggravating factor must exist before imposition of the death penalty is authorized, and; 2) the existence of an aggravating factor creates a presumption affecting the standard of review used by the Florida Supreme Court when death penalty cases are reviewed.

STATUTORY AGGRAVATING FACTORS ARE SUBSTANTIVE:

> . . . The aggravating and mitigating circumstances enumerated in section 921.141 are substantive law. "The aggravating circumstances of Fla.Stat. §921.141(6)[sic] F.S.A., actually define those crimes - when read in conjunction with Fla.Stat. 782.04(1) . . . F.S.A. - to which the death penalty is applicable in the absence of mitigating circumstances. As such, they must be proved beyond a reasonable doubt before being considered by a judge or jury."

Morgan v. State, 415 So.2d 6, 11 (Fla. 1982)(Emphasis added)

(Citation omitted). See Vaught v. State, 410 So.2d 147, 149 (Fla. 1982)("We find that the provisions of Section 921.141 are matters of substantive law insofar as they define those capital felonies which the legislature finds deserving of the death penalty."); State v. Dixon, 283 So.2d 1, 9 (Fla. 1973)("[T]he aggravating circumstances of Section 921.141(6),[sic] Florida Statutes actually define those crimes, when read in conjunction with Florida Statutes 782.04(1) . . .', to which the death penalty is applicable in the absence of mitigating circumstances.").

Thus, in Florida, the statutory definition of crimes punishable by the death penalty are contained in two separate statutes, Sections 782.04(1) and 921.141(5) (See Appendix B). A defendant is entitled under Florida law to unanimous agreement by the jury insofar as determination of guilt. Williams v. State, 438 So.2d 781 (Fla. 1983), cert. denied, 465 U.S. 1109 (1984); Fla.R.Crim.P. 3.440. The jury in this case determined Hildwin's guilt of first-degree murder based solely on the elements set forth in Section 782.04(1), i.e., the unlawful killing of another human being committed either from premeditation or during the commission or attempted commission of an enumerated felony. (See Appendices B through D). Though a unanimous jury recommendation for the death penalty thereafter followed, the basis was unarticulated and the existence of the aggravating factors upon which the death penalty was based and upon which appellate review is based was made by the trial judge individually rather than by the twelve person jury. (See Appendices E through G).

In Florida the statutory aggravating factors authorize imposition of the death penalty and they guide the sentencer's discretion in determining when the death penalty should be imposed. In Zant v. Stephens, 462 U.S 862 (1983) this Court recognized "that statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty." Zant at 878 (Emphasis added). In Florida, the factors are further used by the appellate court when a proportionality review of death cases is performed prior to

affirmance of the death penalty in any particular case. Where no statutory aggravating circumstances exist it is virtually impossible for the aggravating factors to outweigh the mitigating circumstances so, in the absence of any valid aggravating circumstance, imposition of a sentence of life imprisonment is mandatory and the death penalty is wholly unavailable. See Banda v. State, 13 FLW 451, 452 (Fla. July 14, 1988)("The death penalty is not permissible under the law of Florida where, as here, no valid aggravating factors exist."). Thus, determination of the existence of even one circumstance is the pivotal distinction between imposition of a mandatory sentence of life imprisonment and a discretionary sentence of death. This distinction alone qualifies for Due Process protection under the Fourteenth Amendment, as squarely held by this Court.

Specifically, in McMillan v. Pennsylvania, 477 U.S. 79 (1986), this Court held that the Due Process clause of the Fourteenth Amendment does not require the state to prove visible possession of a firearm beyond a reasonable doubt since Pennsylvania's statute neither altered the maximum penalty for the crime committed nor created a separate offense calling for a separate penalty, but operated solely to limit the sentencing court's discretion in selecting a penalty within a range already available to it. McMillan, 477 U.S. at 87-88. The converse of that scenario exists here, where the presence of one viable statutory aggravating circumstance "ups the ante" from mandatory imposition of a life sentence to discretionary imposition of the death penalty. Florida recognizes that the statutory aggravating circumstances "define those crimes which the legislature finds deserving of the death penalty", Vaught, 410 So.2d at 149, and that "they must be proved beyond a reasonable doubt", Morgan, 415 So.2d at 11. This comports with requirements of Due Process under the the Sixth and Fourteenth Amendment. In re Winship, 397 U.S. 358 (1970). However, due process also mandates that the defendant receive the Sixth Amendment right to jury determination of the existence of those factors vital to imposition of the death penalty. The heightened concerns for due process in the

context of imposition of the death penalty requires that the full panoply of Constitutional rights assured the people through the Fourteenth Amendment be expended prior to the state exacting the life of one of its members. "[B]ecause there is a qualitative difference between death and any other permissible form of punishment, 'there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a particular case." Zant v. Stephens, 462 U.S. at 884, quoting Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

> Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.

Duncan v. Louisiana, 391 U.S. 145, 156 (1968). The very purpose of the jury system mandates that, in such a politically-sensitive matter, where cases usually are of high public concern and visibility, the considerations peculiar to an appointed or elected trial judge should not infect the fact-finding process upon which so much depends. Political considerations unique to the appointed or elected official are irrelevant to just imposition of the death penalty and are otherwise the type of influences that render imposition of the death penalty unreliable under the Eighth and Fourteenth Amendments. See Booth v. Maryland, 482 U.S. __, 107 S.Ct. 2529 (1987).

Further, under Florida law, the existence of one viable statutory aggravating factor in the absence of any mitigating circumstances creates a presumption that death is the appropriate penalty. See Jackson v. State, 502 So.2d 409, 413 (Fla. 1986) ("We have repeatedly held that when there are one or more valid aggravating factors and none in mitigation, death is presumed to be the appropriate penalty."); Cooper v. State, 492 So.2d 1059, 1063 (Fla. 1986)("We are left with five valid aggravating factors

and no mitigation and thus with the presumption that death is the appropriate penalty."). See also Johnston v. State, 495 So.2d 863 (Fla. 1986); White v. State, 446 So.2d 1031 (Fla. 1984); Armstrong v. State, 399 So.2d 953 (Fla. 1981). Thus, when on appeal one of two or more statutory aggravating factors is thrown out, if a recommendation of death issued from the jury and nothing in mitigation has been found by the trial judge, the Florida Supreme Court affirms imposition of the death penalty. See Rogers v. State, 511 So.2d 526 (Fla. 1987)(Death penalty affirmed where Florida Supreme Court rejects three of five statutory aggravating factors relied on by trial judge to impose death sentence). However, when a jury recommendation of life has issued, the Florida Supreme Court speculates that the jury could have relied on evidence to render a valid life recommendation, even though the trial judge rejected the sufficiency of that evidence to show mitigating factors. See Amazon v. State, 487 So.2d 8 (Fla. 1986). A complete analysis of the arbitrariness of this varying standard of review cannot here be set forth. A thorough analysis would yield the conclusion that jury determination of the existence of statutory circumstances is required to control the arbitrary review provided by the Supreme Court of Florida under the Sixth and Fourteenth Amendments.

This issue warrants immediate resolution because it is recurrent, of fundamental significance, and was rejected by the Florida Supreme Court in direct circumvention of this Court's decisions in Patterson v. New York, 432 U.S. 197 (1977), Mullaney v. Wilbur, 421 U.S. 684 (1975), and Duncan v. Louisiana, 391 U.S. 145 (1968). The punishment is irrevocable; it is the most drastic remedy available to civilized society. Though Petitioner may ultimately receive review and prevail, those who precede him may have their sentence carried out in Florida under what is patently an unconstitutional procedure. That likelihood generates the exigency to make granting review of this case provident.

EDITOR'S NOTE:

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CONCLUSION

This Court should grant ceriorari review of this case to allow the issues to be fully briefed concerning violations of the Sixth and Fourteenth Amendments.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

PAUL C. HILDWIN
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

A P P E N D I X

Appendix "A" - Hildwin v. State 13 FLW 528 (Fla. Sept. 1 1988)

Appendix "B" - Sections 782.04, 921.141, Florida Statutes

Appendix "C" - Jury instructions (Guilt phase, R991-1010)

Appendix "D" - Jury verdict (Guilt phase, R1383)

Appendix "E" - Jury instructions (Penalty phase, R1120-1126)

Appendix "F" - Jury recommendation (Penalty phase, R1387)

Appendix "G" - Findings of Fact in Support of the Death Penalty (R1394-1396)

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Criminal law—Murder—Death penalty—No abuse of discretion in failure to strike, for cause, a juror who had seen defendant in custody of sheriff's deputies while being transported from jail to courthouse—Judge's answering of question from jury by sending note to jury room without bringing jury into courtroom harmless error where both counsel were given prior notification and an opportunity to make their positions known—Evidence of defendant's prior sexual battery of another person admissible in penalty phase to rebut evidence of defendant's nonviolent nature—Aggravating circumstances—Findings that murder was especially heinous, atrocious and cruel, and that murder was committed for pecuniary gain supported by evidence

PAUL C. HILDWIN, Appellant, vs. STATE OF FLORIDA, Appellee. Supreme Court of Florida. Case No. 69,520. September 1, 1988. An Appeal from the Circuit Court in and for Hernando County, L. B. Hoffstetler, Jr., Judge. James B. Gibson, Public Defender and Larry B. Henderson, Assistant Public Defender, Seventh Judicial Circuit, Daytona Beach, Florida, for Appellant. Robert A. Butterworth, Attorney General and Paula C. Coffman, Assistant Attorney General, Daytona Beach, Florida, for Appellee.

(PER CURIAM.) Appellant, Paul C. Hildwin, Jr., appeals his conviction by a jury for first-degree murder and the death sentence imposed by the trial court. We have jurisdiction. Art. V, § 3(b)(1), Fla. Const.

Appellant was arrested after cashing a check purportedly written to him by one Vronzette Cox, a forty-two-year-old woman whose body had been found in the trunk of her car, which was hidden in dense woods in Hernando County. Death was due to strangulation; she also had been raped. Evidence indicated she had been killed in a different locale from where her body was found. Her purse, from which some contents had been removed, was found in dense woods, directly on line between her car and appellant's house. A pair of semen-encrusted women's underpants was found on a laundry bag in her car, as was a sweat-stained wash rag. Analysis showed the semen and sweat came from nonsecretor (i.e., one who does not secrete blood into other bodily fluids). Appellant, a white male, was found to be a nonsecretor; there was testimony that white male nonsecretors make up ninety percent of the population.

The victim had been missing for four days when her body was found. The man she lived with, one Haverty, said she had left their home to wash clothes at a coin laundry. To do so, she had to pass a convenience store. Appellant's presence in the area of the store on the date of her disappearance had come about this way. He and two women had gone to a drive-in movie, where they had spent all their money. Returning home early in the morning, their car ran out of gas. A search of the roadside yielded pop bottles, which they redeemed for cash and bought some gasoline. However, they still could not start the car. After spending the night in the car, appellant set off on foot at 9 a.m. toward the convenience store near the coin laundry. He had no money when he left, but when he returned about an hour and a half later, he had money and a radio. Later that day, he cashed a check (which he later admitted forging) written to him on Ms. Cox's account. The teller who cashed the check remembered appellant cashing it and recalled that he was driving a car similar to the victim's.

The check led police to appellant. After arresting him the police searched his house, where they found the radio and a ring, both of which had belonged to the victim. Appellant gave several explanations for this evidence and several accounts of the killing, but at trial testified that he had been with Haverty and the victim while they were having an argument, and that when Haverty began beating and choking her, he left. He said he stole the checkbook, the ring, and the radio. Haverty had an alibi for the time of the murder and was found to be a secretor.

Appellant made two pretrial statements that are pertinent here. One was a confession made to a cellmate. The other was a statement made to a police officer to the effect that Ms. Cox's killer had a tattoo on his back. Haverty had no such tattoo, but appellant did.

During the penalty phase the state introduced evidence that appellant previously had been convicted of violent felonies in New York and that he was on parole. Appellant's case consisted of testimony from his father, a couple that had raised him after his father had abandoned him, and a friend. The thrust of their testimony was that he had not been a violent person in their dealings with him. In rebuttal the state called a woman who testified that appellant had, five months before Ms. Cox was murdered, committed sexual battery on her. She admitted she had not reported the crime. The jury recommended death by a unanimous vote.

In his order imposing the death sentence, the trial judge found four aggravating circumstances: that appellant had previous convictions for violent felonies; that appellant was under a sentence of imprisonment at the time of the murder; that the killing was committed for pecuniary gain; and that the killing was especially heinous, atrocious, and cruel. He found nothing in mitigation.

Appellant alleges numerous errors pertaining to both guilt and sentence. We find that some merit discussion.

GUILT PHASE

Issue I: An unsworn juror's catching sight of appellant in the custody of the sheriff.

Before the first day of testimony, but after voir dire, a juror arrived at the courthouse early and saw the sheriff's deputies taking appellant from the van that had transported him from the jail. Appellant told his lawyer, who made a motion to disqualify that juror. The panel had not been sworn at this time. In chambers the trial judge and defense counsel questioned the juror, who

testified that he drew no inferences from seeing appellant in custody and had not talked to any other jurors about the incident. The judge denied the motion.

The central issue here is one of perception. Appellant now argues that because trial counsel had not exhausted his peremptory challenges, and because the panel had not yet been sworn, the motion to disqualify should be seen as an attempt to backstrike, which the court had no authority to deny. *See Rivers v. State*, 458 So.2d 762 (Fla. 1984); *Jones v. State*, 332 So.2d 615 (Fla. 1976). The state points out that defense counsel never used the words "peremptory challenge" and that this was not the nature of his effort to disqualify the juror.

The defense motion was not a peremptory challenge. The defense in a criminal trial need give no reason for exercising its peremptory challenges. It is clear that this was a challenge for cause directed toward the possible taint which may have been caused by the juror seeing appellant in the custody of law enforcement. Thus, the inquiry must focus on whether the denial of the challenge was error.

Our review of the record persuades us that the judge did not abuse his discretion in failing to strike the juror for cause. It is apparent from his answers to questions posed by the judge and counsel that the juror had not made much of the incident and had told none of his fellow jurors. A juror's catching inadvertent sight of a defendant in handcuffs, chains or other restraints (what the juror saw in this regard is not clear) is not so prejudicial as to require a new trial. *Heiney v. State*, 447 So.2d 210 (Fla.), *cert. denied*, 469 U.S. 920 (1984); *Neary v. State*, 384 So.2d 881 (Fla. 1980).

Issue II: The jury being instructed by the judge by means of a note sent to the jury room.

While the jury was deliberating appellant's guilt, it sent a note to the judge asking: "The distance from his home to where the car was found?" The judge called counsel into chambers and informed both sides of the request. He told them he proposed to answer as follows: "You must rely on your memory of the testimony." After both counsel concurred with the response, the judge wrote it on the jury's note and returned it to the jury. The judge did not bring the jury into the courtroom, and there is no indication that the defendant was present in chambers. Appellant seeks the application of the per se rule of reversal established in *Jones v. State*, 351 So.2d 26 (Fla. 1977).

The Florida Rules of Criminal Procedure are explicit on this point.

> After the jurors have retired to consider their verdict, if they request additional instructions or to have any testimony read to them they shall be conducted into the courtroom by the officer who has them in charge and the court may give them such additional instructions or may order such testimony read to them. Such instructions shall be given and such testimony read only after notice to the prosecuting attorney and to counsel for the defendant.

Fla. R. Crim. P. 3.410. The question the jury asked was within the scope of the rule. *See Curtis v. State*, 480 So.2d 1277 (Fla. 1985). However, unlike *Jones* and *Curtis*, both counsel were notified and given the opportunity to make their positions known to the judge. Therefore, the only violation of the rule occurred when the judge failed to return the jury to the courtroom. Under the circumstances, this was harmless error. *See Meek v. State*, 487 So.2d 1058 (Fla. 1986); *Stano v. State*, 473 So.2d 1282 (Fla. 1985), *cert. denied*, 474 U.S. 1093 (1986). Clearly, the appellant suffered no prejudice.

PENALTY PHASE

Issue III: Introduction of rebuttal evidence of an uncharged crime.

Appellant points out that he was not charged with sexual battery in the incident testified to by the state's witness. Therefore, he argues that testimony concerning the alleged attack was inadmissible because it is evidence of collateral crimes and its presentation to the jury was error. The state responds that the appellant opened the door to this type of evidence by mounting a case that dealt with his nonviolent nature; this incident was relevant to rebut that claim.

At the outset, it must be remembered that there is a different standard for judging the admissibility and relevance of evidence in the penalty phase of a capital case, where the focus is substantially directed toward the defendant's character. *See* § 921.141(1), Fla. Stat. (1987). In *Elledge v. State*, 346 So.2d 998, 1001 (Fla. 1977), we pointed out that

> the purpose of considering aggravating and mitigating circumstances is to engage in a character analysis of the defendant to ascertain whether the ultimate penalty is called for in the case of that particular man.

Thus, evidence that would not be admissible during the guilt phase could properly be considered in the penalty phase. *Allured v. State*, 322 So.2d 533, 538 (Fla. 1975), *cert. denied*, 428 U.S. 923 (1976).

Section 921.141(1), Florida Statutes (1987), relating to sentencing proceedings, provides that

> evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida.

As noted in *Allured*, "[t]here should not be a narrow application or interpretation of the rules of evidence in the penalty hearing, whether in regard to relevance or any other matter except illegally seized evidence." 322 So.2d at 539 (citing *State v. Dixon*, 283 So.2d 1 (Fla. 1973), *cert. denied sub nom. Hunter v. Florida*, 416 U.S. 943 (1974)).

Because no conviction was obtained, evidence such as that introduced in the instant case has been deemed inadmissible to prove the aggravating circumstance of committing a previous violent felony. *Provence v. State*, 337 So.2d 783 (Fla. 1976), *cert. denied*, 431 U.S. 969 (1977). On the other hand, even where the defendant waived the mitigating circumstance of no prior criminal activity, the state was allowed to bring out the defendant's prior misconduct when the defendant opened the door by introducing evidence of his nonviolent character. *Parker v. State*, 476 So.2d 134 (Fla. 1985). We hold that, during the penalty phase of a capital case, the state may rebut defense evidence of the defendant's nonviolent nature by means of direct evidence of specific acts of violence committed by the defendant provided, however, that in the absence of a conviction for any such acts, the jury shall not be told of any arrests or criminal charges arising therefrom.[1] *Cf. Squires v. State*, 450 So.2d 208 (Fla.) (in guilt phase of trial, state was permitted to rebut evidence of nonviolent character by showing that defendant had fired a deadly weapon at persons other than

the victim), *cert. denied*, 469 U.S. 892 (1984). The court did not err in permitting the rebuttal evidence of the separate incident of sexual battery. Such evidence was more reliable than the reputation evidence which was condemned in *Dragovich v. State*, 492 So.2d 350 (Fla. 1986).

Issue IV: The finding that the killing was especially heinous, atrocious, and cruel.

The trial judge found that the killing was "especially wicked, evil, atrocious or cruel." To support this finding, the judge made two major points: First, the victim took several minutes to lose consciousness and would have been aware during that time of her impending doom. Second, she was brutally attacked, as evidenced by the torn bra found with the body and by the statement appellant gave to Investigator Phifer that she screamed and begged for help while she was strangled, and that her face turned blue before she lost consciousness.

Appellant argues that because there were no defensive wounds found on the body and because the other evidence of the killing, such as the time it took the victim to die, was not conclusively established, the judge engaged in mere speculation. Appellant argues that the evidence is just as consistent with the premise that the victim died during an especially physical, but nonetheless consensual, sexual encounter.

We disagree that the evidence does not support the judge's finding. The killing clearly meets the test set forth in *Dixon*, which requires that the murder be accompanied by additional acts that make the crime pitiless and unnecessarily torturous to the victim. 283 So.2d at 9. We have often found that strangulation murders meet this test, and we are not prepared to say that this case, where the evidence points convincingly to a conclusion that the appellant abducted, raped, and slowly killed his victim, does not measure up to that standard.[2] This is especially true in light of the fact that appellant made his victim "acutely aware of [her] impending [death]." *Cooper v. State*, 492 So.2d 1059, 1062 (Fla. 1986), *cert. denied*, 107 S. Ct. 1330 (1987). *See also Tompkins v. State*, 502 So.2d 415, 421 (Fla. 1986), *cert. denied*, 107 S. Ct. 3277 (1987); *Johnson v. State*, 465 So.2d 499, 507 (Fla.), *cert. denied*, 474 U.S. 865 (1985). The aggravating circumstance that the killing was especially heinous, atrocious, or cruel was established by the evidence in the record beyond a reasonable doubt.

Issue V: The finding that the killing was committed for pecuniary gain.

Relying on the fact that appellant admitted forging one of the victim's checks, the fact that he testified that he needed money, and the fact that he was in possession of the victim's ring and radio, the trial judge found the aggravating factor that the killing was committed for pecuniary gain.

Appellant attacks this finding, saying that while proof of possession of recently stolen property raises an inference that the possessor stole it, possession alone does not prove that the goods were stolen by the defendant. Appellant argues that the circumstantial evidence in this case does not rebut all reasonable hypotheses to the contrary.

We disagree. The evidence, while circumstantial that appellant killed Ms. Cox to get money from her, is substantial. Before he killed Ms. Cox, appellant had no money and was reduced to searching for pop bottles on the road side to scrape up enough cash to buy sufficient gas to get home. After her death he had her property and had forged and cashed a check on her account. The record supports the judge's finding beyond a reasonable doubt that the killing was committed for pecuniary gain.

REMAINING POINTS ON APPEAL

We reject without discussion Kokal's other arguments: (1) that the trial judge should have instructed the jury as to the minimum and maximum possible penalties; (2) that a witness who had not explicitly testified to a lack of present recollection should not have been permitted to read from notes taken at the time of a conversation; (3) that the evidence was insufficient to sustain the jury's finding of guilt; (4) that the testimony of a state witness regarding his criminal record was improper; (5) that the state should have been required to furnish criminal records of all its witnesses; (6) that the death penalty was unconstitutionally imposed because the jury did not consider the elements that statutorily define the crimes for which the death penalty may be imposed; (7) that the jury instructions on aggravating and mitigating circumstances were misleading; and (8) that the sentencing order was not specific enough.

As we find no merit in any of appellant's arguments, we affirm the judgment of guilt and sentence of death.

It is so ordered. (EHRLICH, C.J., and OVERTON, McDONALD, SHAW, GRIMES and KOGAN, JJ., Concur. BARKETT, J., Concurs in result only.)

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[1] We hasten to add that evidence that the defendant had been a deviated fourth grade or a good juvenile would not place in issue his reputation for nonviolence.

[2] As did the trial judge, we rely in part on appellant's own statement to Investigator Phifer regarding the killing of Veronnie Cox. While the appellant gave several statements which were somewhat conflicting, this fact alone does not prevent a court from considering those parts of the statement that bear an indicia of reliability. *Johnson v. State*, 465 So.2d 499, 506 (Fla.), *cert. denied*, 474 U.S. 865 (1985). The indicia of reliability in the statement given to Investigator Phifer is that it describes the killer as having a cross tattooed on his back, as appellant does. Also, the statement was very detailed.

CHAPTER 782

HOMICIDE

782.02 Justifiable use of deadly force.—The use of deadly force is justifiable when a person is resisting any attempt to murder such person or to commit any felony upon him or upon or in any dwelling house in which such person shall be.

History.—[illegible]

782.03 Excusable homicide.—Homicide is excusable when committed by accident and misfortune in doing any lawful act by lawful means with usual ordinary caution and without any unlawful intent, or by accident and misfortune in the heat of passion, upon any sudden and sufficient provocation, or upon a sudden combat, without any dangerous weapon being used and not done in a cruel or unusual manner.

History.—[illegible]

782.04 Murder.—

(1)(a) The unlawful killing of a human being:

1. When perpetrated from a premeditated design to effect the death of the person killed or any human being, or

2. When committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any:

a. Trafficking offense prohibited by s. 893.135(1),
b. Arson,
c. Sexual battery,
d. Robbery,
e. Burglary,
f. Kidnapping,
g. Escape,
h. Aggravated child abuse,
i. Aircraft piracy, or
j. Unlawful throwing, placing, or discharging of a destructive device or bomb; or

3. Which resulted from the unlawful distribution of any substance controlled under s. 893.03(1), cocaine as described in s. 893.03(2)(a)4., or opium or any synthetic or natural salt, compound, derivative, or preparation of opium by a person 18 years of age or older, when such drug is proven to be the proximate cause of the death of the user,

is murder in the first degree and constitutes a capital felony, punishable as provided in s. 775.082.

(b) In all cases under this section, the procedure set forth in s. 921.141 shall be followed in order to determine sentence of death or life imprisonment.

(2) The unlawful killing of a human being, when perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual, is murder in the second degree and constitutes a felony of the first degree, punishable by imprisonment for a term of years not exceeding life or as provided in s. 775.082, s. 775.083, or s. 775.084.

(3) When a person is killed in the perpetration of, or in the attempt to perpetrate, any:

(a) Trafficking offense prohibited by s. 893.135(1),
(b) Arson,
(c) Sexual battery,
(d) Robbery,
(e) Burglary,
(f) Kidnapping,
(g) Escape,
(h) Aggravated child abuse,
(i) Aircraft piracy, or
(j) Unlawful throwing, placing, or discharging of a destructive device or bomb,

by a person other than the person engaged in the perpetration of or in the attempt to perpetrate such felony, the person perpetrating or attempting to perpetrate such felony is guilty of murder in the second degree, which constitutes a felony of the first degree, punishable by imprisonment for a term of years not exceeding life or as provided in s. 775.082, s. 775.083, or s. 775.084.

(4) The unlawful killing of a human being, when perpetrated without any design to effect death, by a person engaged in the perpetration of, or in the attempt to perpetrate, any felony other than any:

(a) Trafficking offense prohibited by s. 893.135(1),
(b) Arson,
(c) Sexual battery,
(d) Robbery,
(e) Burglary,
(f) Kidnapping,
(g) Escape,
(h) Aggravated child abuse,
(i) Aircraft piracy,
(j) Unlawful throwing, placing, or discharging of a destructive device or bomb, or
(k) Unlawful distribution of any substance controlled under s. 893.03(1), cocaine as described in s. 893.03(2)(a)4., or opium or any synthetic or natural salt, compound, derivative, or preparation of opium by a person 18 years of age or older, when such drug is proven to be the proximate cause of the death of the user,

is murder in the third degree and constitutes a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

History.—[illegible]

cf.—[illegible]

[illegible]

782.07 Manslaughter.—The killing of a human being by the act, procurement, or culpable negligence of another, without lawful justification according to the provisions of chapter 776 and in cases in which such killing shall not be excusable homicide or murder, according to the provisions of this chapter, shall be deemed manslaughter and shall constitute a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

History.—[illegible]

cf.—s. 316.193 Driving under the influence; penalties.
s. 732.802 Killer not entitled to receive property or other benefits by reason of victim's death.

782.071 Vehicular homicide.—

(1) "Vehicular homicide" is the killing of a human being by the operation of a motor vehicle by another in a reckless manner likely to cause the death of, or great bodily harm to, another. Vehicular homicide is a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(2) Any person who commits vehicular homicide and willfully fails to stop or comply with the requirements of s. 316.027(1) is guilty of a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

History.—[illegible]

cf.—s. 316.193 Driving under the influence; penalties.
[illegible]

782.072 Vessel homicide.—

(1) "Vessel homicide" is the killing of a human being by the operation of a vessel as defined in s. 327.02 by another in a reckless manner likely to cause the death of, or great bodily harm to, another. Vessel homicide is a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(2) Any person who commits vessel homicide and willfully fails to stop or comply with the requirements of s. 327.30(4) is guilty of a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

History.—s. 1, ch. 87-20.

782.08 Assisting self-murder.—Every person deliberately assisting another in the commission of self-murder shall be guilty of manslaughter, a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

History.—[illegible]

cf.—s. 732.802 Killer not entitled to receive property or other benefits by reason of victim's death.

782.09 Killing of unborn child by injury to mother.—The willful killing of an unborn quick child, by any injury to the mother of such child which would be murder if it resulted in the death of such mother, shall be deemed manslaughter, a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

History.—[illegible]

cf.—s. 732.802 Killer not entitled to receive property or other benefits by reason of victim's death.

782.11 Unnecessary killing to prevent unlawful act.—Whoever shall unnecessarily kill another, either while resisting an attempt by such other person to commit any felony, or to do any other unlawful act, or after such attempt shall have failed, shall be deemed guilty of manslaughter, a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

History.—[illegible]

cf.—s. 732.802 Killer not entitled to receive property or other benefits by reason of victim's death.

(1) SEPARATE PROCEEDINGS ON ISSUE OF PENALTY.—Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special jury or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) ADVISORY SENTENCE BY THE JURY.—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH.—Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5); and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.—

sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

(4) REVIEW OF JUDGMENT AND SENTENCE.—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within 60 days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed 30 days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) AGGRAVATING CIRCUMSTANCES.—Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, sexual battery, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(j) The victim of the capital felony was a law enforcement officer engaged in the performance of his official duties.

(6) MITIGATING CIRCUMSTANCES.—Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime

History.—s. 237, ch. 1868; GS 1936; CGL 1940 Supp. 8863(34); s. 119, ch. 70-336; s. 1, ch. 72-72; s. 8, ch. 72-724; s. 1, ch. 74-379; s. 248, ch. 77-104; s. 1, ch. 77-174; s. 1, ch. 79-353; s. 177, ch. 83-216; s. 1, ch. 87-368.

Note.—Former s. 919.23.

MR. LEWAN: No, Judge.

THE COURT: All right. Bring in the jury.

(Whereupon, the following proceedings were had in open court in the presence of the jury panel.)

THE COURT: All right. Members of the jury, I thank you for your attention during the trial. Please pay attention to the instructions I am about to give you. I will, as has been indicated earlier, give you the instructions. I have numbered them so that if they were to get out of order, it would make it easier for you to put them back together.

Paul Christopher Hildwin, the defendant in this case, has been accused of the crime of murder in the first degree. In considering the evidence, you should consider the possibility that although the evidence may not convince you that the defendant committed the main crime of which he's accused, there may be evidence that he committed other acts that would constitute a lesser included crime. Therefore, if you decide that the main accusation has not been proved beyond a reasonable doubt, you will next need to decide if the defendant is guilty of any lesser included crime. The lesser crimes indicated in the definition of first degree murder are second degree murder, third degree murder, and manslaughter.

The definition of murder in the first degree: There are two ways in which a person may be convicted of first degree murder. One is known as premediated murder and the other is known as felony murder. Before you can find the defendant guilty of first degree premeditated murder, the State must prove the following three elements beyond a reasonable doubt:

(1) That Vronzettie Cox is dead.

(2) That the death was caused by the criminal act or agency of Paul Christopher Hildwin, and

(3) There was a premeditated killing of Vronzettie Cox.

Killing with premeditation is killing after consciously deciding to do so. The decision must be present in the mind at the time of the killing. The law does not fix the exact period of time that must pass between the formation of the premeditated intent to kill and the killing. The period of time must be long enough to allow reflection by the defendant. The premeditated intent to kill must be formed before the killing. The question of premeditation is a question of fact to be determined by you from the evidence. It will be sufficient proof of premeditation if the circumstances of the killing and the conduct of the accused convince you beyond a

reasonable doubt of the existence of premeditation at the time of the killing.

Felony murder, first degree: Before you can find the defendant guilty of first degree felony murder, the State must prove the following three elements beyond a reasonable doubt:

(1) Vronzettie Cox is dead.

(2) The death occurred as a consequence of or while Paul Christopher Hildwin was engaged in the commission of robbery.

(3) Paul Christopher Hildwin was the person who actually killed Vronzettie Cox.

In order to convict of first degree murder, it is not necessary for the State to prove that the defendant had a premeditated design or intent to kill. That's first degree felony murder.

Robbery is defined as: Before you can find the defendant guilty of robbery, the State must prove the following elements beyond a reasonable doubt.

(1) Paul Christopher Hildwin took the money or property described in the charge from the person or custody of Vronzettie Cox.

(2) The taking was by force, violence, or assault by putting Vronzettie Cox in fear.

(3) The property taken was of some value, and

(4) Paul Christopher Hildwin took the money or property described in the charge from the person or custody of Vronzettie Cox and at the time of the taking intended to permanently deprive Vronzettie Cox of the money or property.

In order for a taking of property to be robbery, it's not necessary that the person robbed be the actual owner of the property. It is sufficient that the victim has custody of the property at the time of the offense. The taking must be by the use of force or violence or by assault so as to overcome the resistance of the victim or by putting the victim in fear so that he does not resist. The law does not require that the victim of robbery resist to any particular extent or that he offer any actual physical resistance if the circumstances are such that he is placed in fear of death or great bodily harm if he does resist, but unless prevented by fear, there must be some resistance to make the taking one done by force or violence.

Second degree murder: Before you can find the defendant guilty of second degree murder, the State must prove the following three elements beyond a reasonable doubt:

(1) Vronzettie Cox is dead.

(2) The death was caused by the criminal act or agency of Paul Christopher Hildwin.

(3) There was an unlawful killing of Vronzettie Cox by an act imminently dangerous to another and evincing a depraved mind regardless of human life.

An act is imminently dangerous to another and evincing a depraved mind regardless of human life if it is an act or series of acts that:

(1) A person of ordinary judgment would know is reasonably certain to kill or do serious bodily injury to another.

(2) It is done from ill will, hatred, spite, or evil intent, and

(3) Is of such a nature that the act itself indicates an indifference to human life.

In order to convict of second degree murder, it is not necessary for the State to prove that the defendant had a premeditated intent to cause death.

Third degree murder: Before you can find the defendant guilty of third degree murder, the State must prove the following three elements beyond a reasonable doubt:

(1) Vronzettie Cox is dead.

(2) The death occurred as a consequence of and while Paul Christopher Hildwin was engaged in the

commission of grand theft.

(3) Paul Christopher Hildwin was the person who actually killed Vronzettie Cox.

It is not necessary for the State to prove the killing was perpetrated with a design to effect death.

The definition of grand theft is as follows: Before you can find the defendant guilty of theft, the State must prove the following two elements beyond a reasonable doubt:

(1) Paul Christopher Hildwin knowingly and unlawfully obtained the property of Vronzettie Cox.

(2) He did so with the intent to either temporarily or permanently appropriate the property of Vronzettie Cox to his own use or to the use of any person not entitled to it.

The punishment provided by law for the crime is greater depending on the value of the property taken. Therefore, if you find the defendant guilty of theft, you must determine by your verdict whether the value of the property taken was less than a hundred dollars or more, but less than $20,000.

Manslaughter: Before you can find the defendant guilty of manslaughter, the State must prove the following elements beyond a reasonable doubt:

(1) Vronzettie Cox is dead.

(2) The death was caused by the wrongful act of Paul Christopher Hildwin.

The definition of culpable negligence is: Before you can find the defendant guilty of culpable negligence, the State must prove the following two elements beyond a reasonable doubt:

(1) Paul Christopher Hildwin inflicted actual personal injury on Vronzettie Cox.

(2) He did so through culpable negligence.

Actual injury is not required.

I will now define culpable negligence for you. Each of us has a duty to act reasonably towards others. If there is a violation of that duty without any conscious intention of harm, that violation is negligence, but culpable negligence is more than a failure to use ordinary care for others. In order for negligence to be culpable, it must be gross and flagrant. Culpable negligence is a course of conduct showing reckless disregard for human life or the safety of persons exposed to its dangerous effects or such an entire want of care as to raise the presumption of a conscious indifference of the consequences or which shows wantonness or recklessness or grossly careless disregard for the

safety and welfare of the public or such an indifference to the rights of others as is equivalent to an intentional violation of such rights.

The State must prove that the crime was committed between the first and thirteenth day of September, 1985, and it must be proved only to a reasonable certainty that the alleged crime was committed in this county.

The defendant has entered a plea of not guilty. This means you must presume or believe the defendant is innocent. The presumption stays with the defendant as to each material allegation in the indictment through each stage of the trial until it's been overcome by the evidence to the exclusion of and beyond a reasonable doubt. To overcome the defendant's presumption of innocence, the State has the burden of proving the following two elements:

(1) The crime with which the defendant is charged was committed.

(2) The defendant is the person who committed the crime.

The defendant is not required to prove anything.

Whenever the words "reasonable doubt" are used, you must consider the following. A reasonable doubt

is not a possible doubt, a speculative, imaginary or forced doubt. Such a doubt must not influence you to return a verdict of not guilty if you have an abiding conviction of guilt. On the other hand, if after carefully considering, comparing, and weighing all the evidence there is not an abiding conviction of guilt or, if having that conviction, it is one which is not stable but which wavers and vacillates, then the charge is not proven beyond every reasonable doubt and you must find the defendant not guilty because the doubt is reasonable. It is to the evidence introduced upon this trial and to it alone that you are to look for that proof.

A reasonable doubt as to the guilt of the defendant may arise from the evidence, conflict in the evidence, or lack of evidence. If you have a reasonable doubt, you should find the defendant not guilty. If you have no reasonable doubt, you should find the defendant guilty.

It is up to you to decide what evidence is reliable. You should use your common sense in deciding which is the best evidence and which evidence should not be relied upon in considering your verdict. You may find some of the evidence not reliable or less reliable than other evidence. You

should consider how the witnesses acted, as well as what they said. Some of the things you should consider are:

(1) Did the witness seem to have an opportunity to see and know the things about which the witness testified?

(2) Did the witness seem to have an accurate memory?

(3) Was the witness honest and straightforward in answering the attorneys' questions?

(4) Did the witness have some interest in how the case should be decided?

(5) Does the witness's testimony agree with the other testimony and the other evidence in the case?

(6) Was it proved that the witness had been convicted of a crime?

The defendant in this case has become a witness. You should apply the same rules to the consideration of his testimony that you apply to the testimony of the other witnesses.

A statement claimed to have been made by the defendant outside the court has been placed before you. Such a statement should always be considered with caution and weighed with great care to make certain that it was freely and voluntarily made.

Therefore, you must determine from the evidence that the defendant's alleged statement was knowingly, voluntarily, and freely made. In making this determination you should consider the total circumstances, including, but not limited to:

(1) Whether when the defendant made the statement he had been threatened in order to get him to make it; and

(2) Whether anyone had promised him anything in order to get him to make it.

If you conclude the defendant's out of court statement was not freely and voluntarily made, you should disregard it.

Expert witnesses are like other witnesses with one exception. The law permits an expert witness to give his opinion. However, an expert's opinion is only reliable when it's given on the subject about which you believe him to be an expert. Like other witnesses, you may believe or disbelieve all or any part of an expert's testimony.

Deciding a verdict is exclusively your job. I cannot participate in that decision in any way. Please disregard anything I may have said or done that made you think I preferred one verdict over another.

There are some general rules that apply to your discussion. You must follow these rules in order to return a lawful verdict.

(1) You must follow the law as it is set out in these instructions. If you fail to follow the law, your verdict will be a miscarriage of justice. There is no reason for failing to follow the law in this case. All of us are depending upon you to make a wise and legal decision in this matter.

(2) This case must be decided only upon the evidence that you've heard from the answers of the witnesses and have seen in the form of exhibits in evidence and these instructions.

(3) This case must not be decided for or against anyone because you feel sorry for anyone or are angry at anyone.

(4) Remember, the lawyers are not on trial. Your feelings about them should not influence your decision in this case.

(5) Your duty is to determine if the defendant is guilty or not guilty in accordance with the law.

(6) It's the Judge's job to determine what a proper sentence would be if the defendant is guilty.

(7) Whatever verdict you render must be unanimous; that is, each juror must agree to the same

verdict.

(8) Feelings of prejudice, bias, or sympathy are not legally reasonable doubts and they should not be discussed by any of you in any way. Your verdict must be based on your views of the evidence and on the law contained in these instructions.

In just a few minutes you'll be taken to the jury room by the Bailiff. The first thing you should do is elect a foreman. The foreman presides over your deliberations like a chairman of a meeting. It's the foreman's job to sign and date the verdict form when all of you have agreed upon a verdict in this case. The foreman will bring the verdict back to the courtroom when you return. Either a man or a woman may be the foreman of a jury. Your verdict finding the defendant either guilty or not guilty must be unanimous. The verdict must be the verdict of each of the jurors as well as the jury as a whole.

In closing let me remind you that it's important that you follow the law spelled out in these instructions in deciding your verdict. There are no other laws that apply to this case. Even if you do not like the laws that must be applied, you must use them. For two centuries we have agreed to a

Constitution and to live by the law. No one of us has the right to violate the rules we all share.

I have here a verdict form that I will go over with you very briefly. It identifies the court and the judicial circuit or the circuit of the Fifth Judicial Circuit in and for Hernando County, State of Florida. Case Number 85-499-CF. State of Florida versus Paul Christopher Hildwin. And it says verdict: We, the jury, find as follows as to the defendant in this case. You check only one. You have A, B, C, D, and E, but you may only check one.

(A) The defendant is guilty of first degree murder.

(B) The defendant is guilty of second degree murder.

(C) The defendant is guilty of third three murder.

(D) The defendant is guilty of manslaughter.

(E) The defendant is not guilty.

So say we all, and then there's a line for the foreman to sign and a date line under it.

If counsel would approach the bench a moment.

(Whereupon, the following proceedings were had at the bench.)

THE COURT: In the instruction for manslaughter

is that culpable negligence in the body of the instruction? It's just says the evidence --

MR. HOGAN: What does it say?

THE COURT: It just says the definition of culpable negligence.

MR. HOGAN: Shouldn't it say culpable negligence?

THE COURT: Why don't we just check it out and we can send it back to them.

MR. HOGAN: All right.

THE COURT: All right. Now, the first degree felony murder.

MR. HOGAN: Well, it says first degree murder. You might want to explain that to them. I don't know. You might want to wait and see if they ask any questions. The jury instruction states there's two ways to prove first degree murder, premeditated and felony. I checked the listing. It was in the back.

THE COURT: Okay.

(Whereupon, the following proceedings were had in open court.)

THE COURT: All right. I will inquire of the State and of the defense has the Court left out any instructions or misread any of the instructions to the jury?

MR. HOGAN: No, sir.

MR. LEWAN: No, sir.

THE COURT: All right. Ladies and gentlemen of the jury, I'm going to get these instructions back in order and have then delivered to you very shortly. At this time we will recess and the jury will retire to the jury room to deliberate. We will bring in the items that have been admitted into evidence as soon as we can go over them and be sure that the proper items are made available to you, and y'all will commence your deliberation. When you have completed your deliberation and reached a verdict, knock on the door. One of the Bailiffs will be listening and will notify the Court and the parties.

If your deliberations should continue into the evening and you're hungry, which I suspect could happen very easily as far as being hungry after 5:00 or 6:00 o'clock, let us know and we will either make arrangements to take y'all to a restaurant or have some deli food brought in if that becomes necessary. And in the meantime we'll be in recess awaiting an indication that you have completed your deliberations.

All right. Now, the two alternates at this time will be escorted into my offices where y'all will

remain until the jury, the 12 first selected, reach a verdict, and then we'll proceed from there.

We'll be in recess until a verdict is reached. (Whereupon, the alternate jurors left the courtroom.) (Whereupon, the jury panel retired to deliberate at 3:03 p.m.)

THE COURT: All right. Let's have counsel for the State and defense go over the items admitted into evidence so we're sure that the jury will not get something that has not been admitted, and I'll check out this wording on manslaughter.

(Court recessed at 3:05 p.m.)

(Court reconvened at 3:43 p.m.)

(Whereupon, the following proceedings were had in open court in the presence of the defendant.)

THE COURT: Bring in the jury.

(Whereupon, the following proceedings were had in open court in the presence of the jury panel.)

THE COURT: All right. Ladies and gentlemen, through an oversight of both the Court and the State and defense counsel, we left out two paragraphs which we thought that it would be appropriate to call y'all back in. And I will add these two paragraphs to the instructions in the introduction, and I will read the entire page to you. It is as follows:

In this case Paul Christopher Hildwin is accused of first degree murder. Murder in the first degree includes the lesser crimes of murder in the second degree, murder in the third three, and manslaughter, all of which are unlawful. A killing that is excusable or was committed by the use of justifiable deadly force is lawful.

If you find that Vronzettie Cox was killed by Paul Christopher Hildwin, you will then consider the circumstances surrounding the killing in deciding if the killing was first degree murder or was murder in the second degree, murder in the third degree, manslaughter, or whether the killing was excusable or resulted from justifiable use of deadly force.

Justifiable homicide is the killing of a human being and justifiable homicide is lawful if necessarily done while resisting an attempt to murder or commit a felony upon the defendant or to commit a felony in any dwelling house in which the defendant was at the time of the killing.

Excusable homicide: The killing of a human being is excusable and therefore lawful when committed by accident and misfortune in doing any lawful act by lawful means with usual ordinary caution and without any lawful intent or by accident

or misfortune in the heat of passion upon any sudden and sufficient provocation or upon a sudden combat without any dangerous weapon being used and not done in a cruel or unusual manner.

The latter portion of that was that that was left out.

MR. HOGAN: Approach?

THE COURT: All right.

(Whereupon, the following proceedings were had at the bench.)

MR. HOGAN: I just wanted to make sure it got on the record that I'm satisfied with that and if Mr. Lewan had any objections to that.

MR. LEWAN: For the record, I'm not objecting to its inclusion, but I want the record to show that the defense didn't request that these be put in there.

THE COURT: All right.

MR. HOGAN: Okay. Just that there's no objection to it is the main thing.

THE COURT: All right. Now, I'm going to replace Page 2 with this one. This would be two added in.

MR. HOGAN: Okay.

(Whereupon, the following proceedings were had in open court.)

THE COURT: All right. Ladies and gentlemen, I have included these in your instructions as Page 2-A. This is the only instruction that has a letter following it. So without anything further, these instructions will be returned to you and you'll retire to deliberate.

Court will be in recess until I'm advised there is a verdict.

(Whereupon, jury panel retired to continue deliberations at 3:49 p.m.)

(Court reconvened at 5:16 p.m.)

(Whereupon, the following proceedings were had in open court in the presence of the defendant.)

THE COURT: All right. Are we ready for the jury?

MR. COLE: Yes, Your Honor.

THE COURT: All right. Bring in the jury.

(Whereupon, the following proceedings were had in open court in the presence of the jury panel.)

THE COURT: All right. Ladies and gentlemen of the jury, have you reached a verdict?

JUROR QUAINE: We have, Your Honor.

THE COURT: All right. If you would hand it to Mr. Rice, he'll give it to me and I'll look at it and have the Clerk publish it.

above and beyond a normal murder. All murders are bad, but for this phase, this portion of the law, what we're talking about here is something so out of the ordinary of the ordinary murder that it is cruel and unusual, and ladies and gentlemen, we don't have those facts here.

What we have is the young man who had a broken home, mother died at a very early age, father abandoned him. He was in and out of institutions. I suggest to you that he's the product of an environment and does not require the death penalty, ladies and gentlemen, not in this case.

We ask you to have mercy. Thank you.

THE COURT: Ladies and gentlemen of the jury, it's now your duty to advise the Court as to what punishment should be imposed upon the defendant for his crime of murder in the first degree. As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the judge.

However, it's your duty to follow the law that will now be given to you by the Court and render to the Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating

circumstances exist to outweigh any aggravating circumstances found to exist.

Your advisory sentence should be based on the evidence as you heard while trying the guilt or innocence of the defendant and the evidence that's been presented to you in these proceedings. The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence.

One, the crime for which Paul Christopher Hildein is to be sentenced was committed while he was under sentence of imprisonment.

Two, the defendant has been previously convicted of another capital offense or a felony involving the use of violence to some person. A, the crime of rape is a felony involving the use of violence to another person, and, B, the crime of sodomy is a felony involving the use of violence to another person.

Three, the crime for which the defendant is to be sentenced was committed for financial gain.

Four, the crime for which the defendant is to be sentenced was especially wicked, evil, atrocious or cruel.

If you find the aggravating circumstances do not justify the death penalty, your advisory sentence

should be one of life imprisonment without possibility of parole for 25 years. If you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances.

The mitigating circumstances you may consider if established by the evidence is any aspect of the defendant's character or record and any other circumstances of the offense. Each aggravating circumstance must be established beyond a reasonable doubt before it may be considered by you in arriving at your decision.

If any one or more aggravating circumstances are established, you should consider all the evidence tending to establish one or more mitigating circumstances and give that evidence such weight as you feel it should receive in reaching your conclusion as to the sentence that should be imposed.

Mitigating circumstances need not be proved beyond a reasonable doubt by the defendant. If you are reasonably convinced that a mitigating circumstance exists, you may consider it as established.

The sentence that you recommend to the Court must be based upon the facts as you find from the evidence and the law. You should weigh the aggravating circumstances against the mitigating circumstances, and your advisory sentence must be based on these considerations.

In these proceedings, it's not necessary that the advisory sentence of the jury be unanimous. The fact that the determination of whether you recommend a sentence of death or a sentence of life imprisonment in this case can be reached by a single ballot should not influence you to act hastily or without due regard to the gravity of these proceedings.

Before you ballot, you should carefully weigh, sift and consider the evidence and all of it, realizing that human life is at stake and bringing to bear your best judgment in reaching your advisory sentence.

If a majority of the jury determine that Paul Christopher Hildwin should be sentenced to death, your advisory sentence will be a majority of the jury by a vote of nine to nine -- has to be at least seven to five, a majority -- advise and recommend to this Court that it impose the death penalty on Paul Christopher Hildwin. There is a line for a date and

the foreman's signature on this form of sentence as it was in the earlier version".

On the other hand, if My six or more votes the jury determines that Paul Christopher Hildwin should not be sentenced to death, your advisory sentence shall be, "The jury advises and recommends to the Court that it impose a sentence of life imprisonment upon Paul Christopher Hildwin without the possibility of parole for 25 years."

There are two forms of the verdict, one that requires the number voting to be placed as the verdict for imposing the death penalty. The one without it is for imposing the life imprisonment, and you are to fill one or the other but not both.

With the exception of the alternate jurors who will go back into the hearing room, you will now retire to consider your recommendation. When you've reached an advisory sentence in conformity with these instructions, that form of recommendation should be signed by your foreman and returned to the Court.

I will give you the copy of these instructions, and they're again numbered, but only three in number, plus the two forms of the verdict forms, and the Court will await your decision.

Counsel approach the bench a moment.

(Whereupon, the following proceedings were had at the bench.)

THE COURT: Is the documentation admitted into this portion, or any evidence?

MR. HOGAN: They can have any of the evidence that's introduced in the trial, but what I recommend to the Court is you send back with them at this point the evidence introduced during the penalty phase, and tell them if they want to see any of the other evidence, that they'll ask the bailiff to notify you and you'll send back whatever they want to see, unless there's an objection on behalf of the defense.

MR. LEWAN: I don't have any objection, Judge.

(Whereupon, the following proceedings were had in open court in the presence of the jury.)

THE COURT: Ladies and gentlemen, along with you will be the -- will be taken into the jury room the documents that were received in evidence during this phase of the trial. If any of you desire to see any of the other items that were admitted in the trial of the guilt issue, get the attention of the bailiff and I'll see that those items are brought in to you. Otherwise, you'll just have what was received in evidence here today.

All right. If you'll retire and deliberate, the

Court will await your verdict.

(Whereupon, a recess was taken from 3:20 p.m. until 4:10 p.m., after which the following proceedings were had in open court in the presence of the defendant and out of the presence of the jury.)

THE COURT: All right. Bring the jury in.

(Whereupon, the following proceedings were had in open court in the presence of the jury.)

THE COURT: Mr. Foreman, do you have a few matters to bring to the Court's attention?

JUROR QUAINE: Yes, Your Honor, we have.

THE COURT: You can hand it to the bailiff and I'll examine it and have the clerk publish it.

JUROR QUAINE: (Complying.)

THE COURT: All right. I'll direct the clerk to publish the recommendation.

THE CLERK: In the Circuit Court of the Fifth Judicial Circuit in and for Hernando County, State of Florida, Case Number 85-499-CF; State of Florida versus Paul Christopher Hildwin, verdict for advisory sentence. A majority of the jury by a vote of 12 to nothing advise and recommend to the Court that he impose the death penalty on Paul Christopher Hildwin; dated September 5, 1986; Foreman, Robert Quaine.

THE COURT: Does either the State or the defense

IN THE CIRCUIT COURT
OF THE FIFTH JUDICIAL CIRCUIT
IN AND FOR HERNANDO COUNTY
STATE OF FLORIDA

STATE OF FLORIDA — CASE NO. 85-499-CF

VS.

PAUL CHRISTOPHER HILDWIN

VERDICT FORM ADVISORY SENTENCE

A majority of the jury by a vote of 12 to 0 advise and recommend to the Court that it impose the death penalty on PAUL CHRISTOPHER HILDWIN.

September 5, 1986 — DATE

FOREMAN

IN THE CIRCUIT COURT OF THE
FIFTH JUDICIAL CIRCUIT IN AND
FOR HERNANDO COUNTY, FLORIDA

State of Florida

CASE NO. 85-499-CF

vs.

PAUL CHRISTOPHER HILDWIN/

FINDINGS OF FACT

THIS CAUSE being before the Court upon the Indictment of Paul Christopher Hildwin for First Degree Murder and the jury of this cause having found the defendant guilty of First Degree Premeditated Murder, and having recommended to the Court that the defendant, Paul Christopher Hildwin, be sentenced to death, the Court pursuant to Florida Statute 921.141(3) hereby sets forth the finding of facts upon which the Court relies in imposing the sentence of death.

1) The Court hereby finds the following for aggravating circumstances have been proved beyond and to the exclusion of a reasonable doubt as evidenced by the Courts finding of facts as to each aggravating circumstance:

A) The defendant was previous convicted of another capital felony or of a felony involving the use of threat of violence to a person. F.S.§921.141(5)(b).

Certified copies of the Judgement & Sentence of two prior violent felonies committed by the defendant along with arrest records and fingerprints of the defendant, and inmate records and fingerprints of said defendant, were admitted into evidence during the penalty phase of this matter. This evidence shows that the defendant was convicted in the State of New York, County of Columbia, on March 6, 1979, for First Degree Rape. This evidence also shows that the defendant was convicted in the State of New York, County of Dutchess, on June 15, 1979, for Attempted Sodomy - First Degree - a violent felony. The Court further heard testimony during the penalty portion of the Trial from senior New York State Police Investigator, Robert Brenzel who testified that he investigated the above stated rape committed by the defendant in New York in 1978. The victim of the 1978 New York rape, Lorraine Lydon, testified in the penalty portion of the Trial that the defendant had brutally attacked her at knife-point and raped her in her own home and stolen her purse.

B) The capital felony was committed by a person under sentence of imprisonment.

Certified copies of the defendant's Judgement & Sentence were introduced into evidence during the penalty phase of this Trial, these documents show that the defendant was sentenced in the State of New York, County of Columbia, on May 28, 1979 for a period of

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(1394)

0 - 6 years in the Department of Corrections for Rape in the First Degree. These documents also show that the defendant was sentenced in the State of New York, County of Dutchess on June 15, 1979 to 3 - 9 years in the Department of Corrections for attempted Sodomy in the First Degree. Florida Parole and Probation Officer Lois Black testified that at the time of the homicide in Hernando County that the defendant was a transferee on Parole from the State of New York for the above stated sentences. Further the defendant testified during the Trial that he was on Parole at the time of the homicide on September 9, 1985.

C) The Capital felony was committed for pecuniary gain.

The evidence at Trial clearly establishes that the defendant stole, forged, and cashed a $75.00 check belonging to the victim. The defendant also stole from the victim a pearl ring, and a radio, these items being taken at the time of the murder. The evidence also showed that the defendant had no money before the murder and that immediately following the murder at the next available opportunity, he cashed the victim's check. This evidence establishes that the defendant committed this murder for pecuniary gain.

D) The crime for which the defendant is to be sentenced was especially wicked, evil, atrocious, or cruel.

Doctor Techman, the Medical Examiner, testified that the victim took several minutes to loose consciousness and die due to a wide band on the legiture that was used to strangle her to death. According to Dr. Techman the victim would have been conscious and aware of the fact that she was slowly dying at the hands of the defendant. The victim was driven to an isolated area where the evidence supports that the brutal attack occurred. The evidence further consists of a bra found in the victim's purse which had apparently been ripped off of her body and the metal eyelets in the bra were torn open. The victim was found completely nude, doubled over backwards, locked in the trunk of her own motor vehicle. Semen from a non-secretor was found in the panties of the victim and this was testified to be a consistent trait with the defendant's blood. Further during the statement given by the defendant to Investigator Phifer, Paul Hildwin described the killer as being a person with a tatoo of a cross on his back, the defendant was shown to have a tatoo of a cross on his back during testimony before the jury. During this vivid description by Paul Hildwin to Investigator Phifer, the defendant described the victim begging for mercy and begging for help as she was being slowly strangled to death and her face turning blue.

(1395)

2) The Court has considered all the mitigating circumstances that could have been established on behalf of this defendant and finds that none of the mitigating circumstances were found to exist. The defendant requested that the mitigating factor of his age be put before the jury, however the Court finds that the defendant was 25 years of age at the time of the homicide and that there was no evidence of mental or emotional problems that the defendant had at the time of the homicide that would cause the Court to consider anything other than his chronological age.

The defendant requested no other enumerated mitigating circumstance.

The Court did consider all the testimony concerning the defendant's childhood, his relationship with his father, and his relationship with Mr. & Mrs. Hyott. The Court finds that while the defendant may have had a less than perfect childhood that none of these arise to the level of a mitigating circumstance.

Based upon the evidence presented in the records of both the Trial and the sentencing proceedings in this cause and upon the Court having considered this evidence, argument of counsel, and having carefully weighed the aggravating and mitigating circumstances, and finding that no mitigating circumstances have been shown and further finding that the above four aggravating circumstances have been proven beyond a reasonable doubt, the Court finds that sufficient aggravating circumstances do exist and that the aggravating circumstances far outweigh any mitigation so that the only appropriate sentence in this cause is death.

DONE AND ORDERED in open Court in Brooksville, Hernando County, Florida, this 17th day of September, 1986.

L. R. Huffstetler, Jr.
Circuit Judge

FILED IN OPEN COURT
DATE 9-17-86
HAROLD WILLIAM BRO
Clerk of Circuit Co...
By Deputy Clerk

(1396)

CT REC 207 PG 2279

CERTIFICATE OF SERVICE

I LARRY B. HENDERSON, hereby certify that I am a member of the bar of the Supreme Court of the United States, and that I have served a copy of the foregoing Petition for Writ of Certiorari, by U.S. mail, to the Honorable Robert Butterworth, Attorney General, 125 N. Ridgewood Avenue, fourth floor, Daytona Beach, Fla. 32014.

All parties required to be served have been served on this 5th day of December, 1988.

LARRY B. HENDERSON
ASSISTANT PUBLIC DEFENDER

Counsel for Petitioner

NO. 88-6066

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

PAUL C. MILDWIN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

RESPONDENT'S BRIEF IN OPPOSITION

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EDITOR'S NOTE:

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED

The questions presented by Hildwin are as follows:

> WHETHER IN PROFFITT V. FLORIDA THIS COURT RESOLVED EVERY POSSIBLE CONSTITUTIONAL CHALLENGE THAT COULD EVER BE MADE AGAINST FLORIDA'S DEATH PENALTY PROCEDURE?
>
> WHETHER FLORIDA'S DEATH SENTENCING PROCEDURE VIOLATES THE SIXTH AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?
>
> WHETHER, ONCE A PERSON HAS BEEN FOUND GUILTY OF A CRIME THE STATE MAY IN IMPOSING THE DEATH PENALTY DECREASE THE DUE PROCESS PROTECTIONS AFFORDED BY THE SIXTH AND FOURTEENTH AMENDMENTS?

Respondent has restated the question as follows:

> WHETHER FLORIDA'S CAPITAL SENTENCING PROCEDURE, WHEREIN THE JUDGE, RATHER THAT THE JURY, EXPRESSLY DETERMINES THE PRESENCE OF STATUTORY FACTORS WHICH AUTHORIZE IMPOSITION OF THE DEATH PENALTY, VIOLATES THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND WHETHER THIS QUESTION IS PROPERLY PRESENTED WHERE PETITIONER FAILED TO COMPLY WITH FLORIDA'S PROCEDURAL RULES BY FAILING TO PRESENT IT TO THE STATE TRIAL COURT.
>
> (RESTATED)

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OPINION BELOW.

Petitioner, Paul C. Hildwin ("Hildwin"), seeks review of the decision of the Supreme Court of Florida, Hildwin v. State, 531 So.2d 124 (Fla. 1988), in which the court unanimously affirmed his conviction of first degree murder and sentence of death. A copy of this opinion is included in the appendix to this pleading (See Resp. App. A).

JURISDICTION.

Hildwin seeks review pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Hildwin contends that the Sixth and Fourteenth Amendments to the United States Constitution are implicated, as well as sections 782.04 and 921.141, Florida Statutes (1987). (See Pet. App. B).

STATEMENT OF THE CASE.

i. Statement of the Facts.

Respondent, the State of Florida ("The State"), finds the most accurate statement of the case, as well as of the facts, to be that recounted by the Supreme Court of Florida in its opinion. Accordingly, respondent would set forth the following:

> Appellant [Hildwin] was arrested after cashing a check purportedly written to him by one Vronzettie Cox, a forty-two-year-old woman whose body had been found in the trunk of her car, which was hidden in dense woods in Hernando County. Death was due to strangulation; she also had been raped. Evidence indicated she had been killed in a different locale from where her body was found. Her purse, from which some contents had been removed, was found in dense woods, directly on line between her car and appellant's house. A pair of semen-encrusted women's underpants was found on a laundry bag in her car, as was a sweat-stained wash rag. Analysis showed the semen and sweat came from nonsecretor (i.e., one who does not secrete blood into other bodily fluids). Appellant, a white male, was found to be a nonsecretor; there was testimony that white male nonsecretors make up eleven percent of the population.
>
> The victim had been missing for four days when her body was found. The man she lived with, one Haverty, said she had left their home to wash clothes at a coin laundry. To do so, she had to pass a convenience store. Appellant's presence in the area of the store on the date of her disappearance had come about this way: He and two women had gone to a drive-in movie, where they had spent all their money. Returning home early in the morning, their car ran out of gas. A search of the roadside yielded pop bottles, which they redeemed for cash and bought some gasoline. However, they still could not start the car. After spending the night in the car, appellant set off on foot at 9 a.m. toward the convenience store near the coin laundry. He had no money when he left, but when he returned about an hour and a half later, he had money and a radio. Later that day, he cashed a check (which he later admitted forging) written to him on Ms. Cox's account. The teller who cashed the check remembered appellant cashing it and recalled that he was driving a car similar to the victim's.
>
> The check led police to appellant. After arresting him the police searched his house, where they found the radio and a ring, both of which had belonged to the victim. Appellant gave several explanations for this evidence and several accounts of the killing, but at trial testified that he had been with Haverty and the victim while they were having an argument, and that when Haverty began beating and choking her, he left. He said he stole the checkbook, the ring, and the radio. Haverty had an alibi for the time of the murder and was found to be a secretor.
>
> Appellant made two pretrial statements that are pertinent here. One was a confession made to a cellmate. The other was a statement made to a police officer to the effect that Ms. Cox's killer had a tattoo on his back. Haverty had no such tattoo, but appellant did.
>
> During the penalty phase the state introduced evidence that appellant previously had been convicted of violent

> felonies in New York and that he was on parole. Appellant's case consisted of testimony from his father, a couple that had raised him after his father had abandoned him, and a friend. The thrust of their testimony was that he had not been a violent person in their dealings with him. In rebuttal the state called a woman who testified that appellant had, five months before Ms. Cox was murdered, committed sexual battery on her. She admitted she had not reported the crime. The jury recommended death by a unanimous vote.
>
> In his order imposing the death sentence, the trial judge found four aggravating circumstances: that appellant had previous convictions for violent felonies; that appellant was under a sentence of imprisonment at the time of the murder; that the killing was committed for pecuniary gain; and that the killing was especially heinous, atrocious, and cruel. He found nothing in mitigation.

Hildwin v. State, 531 So.2d at 125-126.

ii. How The Federal Question Was Raised And Decided Below.

Hildwin raised this question -- that the sentencing jury in Florida should expressly determine the presence of statutory factors which authorize imposition of the death penalty -- for the first time in his direct appeal to the Supreme Court of Florida, although Florida procedure requires initial presentation of a claim of this nature to the trial court. See, Trushin v. State, 425 So.2d 1126 (Fla. 1982); Eutzy v. State, 458 So.2d 755 (Fla. 1984), cert. denied, 471 U.S. 1045, 105 S.Ct. 2062, 85 L.Ed.2d 336 (1985). In the Supreme Court of Florida, the state argued that the claim was procedurally barred due to petitioner's failure to properly present or preserve it; in the alternative, the state addressed the merits. (See Resp. App. B). In his reply brief, Hildwin did not dispute the assertion that he had never presented this matter to the circuit court, asserting instead that any error was fundamental. (See Resp. App. B).

In its opinion affirming petitioner's conviction and sentence of death, the Supreme Court of Florida did not address this issue, except to state, "We reject without discussion

Hildwin's other arguments,... [inter alia,] that the death penalty was unconstitutionally imposed because the jury did not consider the elements that statutorily define the crimes for which the death penalty may be imposed." Hildwin, 531 So.2d at 129. The concluding sentence of the opinion reads,

> As we find no merit in any of appellant's arguments, we affirm the judgement of guilt and sentence of death.

Id.

REASONS FOR DENYING THE WRIT.

> FLORIDA'S CAPITAL SENTENCING PROCEDURE WHEREIN THE JUDGE, RATHER THAN THE JURY, EXPRESSLY DETERMINES THE PRESENCE OF STATUTORY FACTORS WHICH AUTHORIZE IMPOSITION OF THE DEATH PENALTY, DOES NOT VIOLATE THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AS A CLEAR READING OF THIS COURT'S PRIOR PRECEDENTS MAKES PLAIN; THE INSTANT QUESTION WAS NOT PROPERLY PRESENTED TO THE STATE COURTS, GIVEN HILDWIN'S FAILURE TO RAISE THE MATTER IN THE TRIAL COURT, AS REQUIRED BY FLORIDA PROCEDURE.

Before proceeding to the merits of petitioner's claim, the State would initially contend that Hildwin has failed to demonstrate that the matter is properly before this Court. This Court has repeatedly held that when the highest court of a state has failed to pass upon a federal question, it will be presumed that the omission was due to the absence of presentation in the state courts, unless the aggrieved party can make an affirmative showing to the contrary. See, Cardinale v. Louisiana, 394 U.S. 437, 89 S.Ct. 1162, 22 L.Ed.2d 398 (1969); Street v. New York, 394 U.S. 576, 89 S.Ct. 1354, 22 L.Ed.2d 372 (1969); Fuller v. Oregon, 417 U.S. 40, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974); Webb v. Webb, 451 U.S. 493, 101 S.Ct. 1889, 68 L.Ed.2d 392 (1981). As noted infra, Hildwin failed to present this claim to the state trial court as required by Florida procedure, see, Eutzy, supra, and the Supreme Court of Florida did not expressly resolve this

claim on the merits in its opinion. The fact that petitioner has received the death penalty does not, standing alone, relieve him of the necessity to comply with Florida's rules of procedure. Cf., Smith v. Murray, 477 U.S. 527, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986).

The Supreme Court of Florida's summary disposition of this claim, albeit in an opinion whose concluding sentence states that no merit has been found in any of petitioner's claims, is consistent with a finding of procedural default as to this matter. When confronted with the state's procedural arguments on appeal, Hildwin could cite to no portion of the record indicating proper preservation, choosing instead to characterize the issue as a "fundamental" one. While the state agrees fully with the fundamental significance of the traditional constitutional right to jury trial which Hildwin now wishes to assert and greatly expand, the alleged genesis of Hildwin's claim in the Sixth Amendment cannot serve to confer preservation where such does not otherwise exist. Even should petitioner's claim seem to possess any surface appeal to this court, the instant case hardly represents an appropriate candidate for review, given the questionable preservation of the issue, as well as its summary disposition below. Certainly, the courts of the state of Florida, trial as well as appellate, have a valid state interest in being afforded an adequate opportunity to pass upon challenges to their capital sentencing procedure prior to the time that such claims are presented to this, or any other federal, court for review. Cf., Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). The instant petition for writ of certio ari should be denied.

In any event, the primary basis for denial of review should be the fact that the question presented by Hildwin would seem , largely, to have already been resolved by this Court's prior precedents. While petitioner initially asks whether this Court's decision in Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976) resolved "every possible constitutional challenge" to Florida's death penalty procedure, no one has ever

claimed that Proffitt did so. The question presented by Hildwin is simply insubstantial. The simple truth remains that in Proffitt, this Court most definitely did expressly conclude that Florida's trifurcated capital sentencing procedure is constitutional. Such holding can obviously be read to suggest that Hildwin's sentence of death, which was imposed following the return of an unanimous recommendation of death by the jury, which was in turn followed by the finding by the trial judge of four aggravating circumstances and nothing in mitigation and, finally, by review by the Supreme Court of Florida, is constitutional. While it is true, as Petitioner Hildwin notes, that the Proffitt decision did not expressly pass upon the question which he now presents -- whether the jury must "find" the statutory aggravating factors in a capital sentence -- it is likewise true that in passing upon the constitutionality of Florida's capital legislation, this Court was cognizant of the fact that, in Florida, the judge, as opposed to the jury, is not only the sole sentencer, but also is the only entity which makes express findings in aggravation or mitigation. Proffitt, 428 U.S. at 249-250, 253, 96 S.Ct. at 2965-2967. To respondent, it seems highly unlikely that this Court overlooked the existence of any fundamental constitutional defect in this process.

It is not, however, the state's position that one need only read Proffitt to resolve Hildwin's claim. Although Hildwin's petition makes no reference to certain subsequent decisions by this Court, there exists a number which involve not only Florida's capital sentencing statute, but which also would seem to conclusively lay to rest petitioner's concerns. The leading case in this regard, of course, is Spaziano v. Florida, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984), in which this Court resolved "questions concerning the administration of Florida's capital sentencing statute". The primary "question" was the constitutionality of the jury override; Spaziano argued that allowing the judge to override the jury's recommendation of life violated not only the Eighth Amendment and the Fifth Amendment's Double Jeopardy Clause made applicable to the states through the

Fourteenth Amendment, but also "the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment." Id. at 459. In rejecting Speziano's argument, this Court held,

> The fact that a capital sentencing is like a trial in the respects significant to the Double Jeopardy Clause, however, does not mean that it is like a trial in respects significant to the Sixth Amendment's guarantee of a jury trial. The Court's concern in **Bullington** was with the risk that the State, with all its resources, would wear a defendant down, thereby leading to an erroneously imposed death penalty. 451 U.S., at 445, 101 S.Ct., at 1861. There is no similar danger involved in denying a defendant a jury trial on the sentencing issue of life or death. The sentencer, whether judge or jury, has a constitutional obligation to evaluate the unique circumstances of the individual defendant and the sentencer's decision for life is final. **Arizona v. Rumsey, supra**. More important, despite its unique aspects, a capital sentencing proceeding involves the same fundamental issue involved in any other sentencing proceeding--a determination of the appropriate punishment to be imposed on an individual. **See Lockett v. Ohio**, 438 U.S. 586, 604-605, 98 S.Ct. 2954, 2964-2965, 57 L.Ed.2d 973 (1978) (plurality opinion); **Woodson v. North Carolina**, 428 U.S. 280, 304, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976) (plurality opinion), citing **Pennsylvania ex rel. Sullivan v. Ashe**, 302 U.S. 51, 55, 58 S.Ct. 59, 60, 82 L.Ed.2d 43 (1937), and **Williams v. New York**, 337 U.S. 241, 247-249, 69 S.Ct. 1079, 1083-1084, 93 L.Ed. 1337 (1949). The Sixth Amendment never has been thought to guarantee a right to a jury determination of that issue.

Speziano, 468 U.S. at 460, 104 S.Ct. at 3161. (Emphasis supplied).

Thus, although this Court in Speziano did not expressly resolve the claim in terms of Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 91 (1968), that precedent was discussed earlier in the opinion. Speziano, 468 U.S. at 459, 104 S.Ct. at 3161. It certainly cannot be said that Speziano's Sixth Amendment claim was ignored nor that such analysis was not employed.

Speziano holds that a death sentence in Florida may constitutionally be imposed in the absence of any finding in

aggravation or recommendation of death by the jury. Speziano's sentence of death is obviously predicated solely upon the sentencing judge's findings in aggravation, and this Court has found such result permissible. Indeed, in resolving Speziano's claim of double jeopardy, this Court further stated,

> Our determination that there is no constitutional imperative that a jury have the responsibility of deciding when the death penalty should be imposed also disposes of petitioner's double jeopardy challenge to the jury override procedure. If a judge may be vested with sole responsibility for imposing the penalty, then there is nothing constitutionally wrong with the judge's exercising that responsibility after receiving the advice of the jury. The advice does not become a judgment simply because it comes from the jury.

Speziano, 468 U.S. at 466, 104 S.Ct. at 3165.

If the jury's advisory verdict is not a "judgment" for the above purposes, then it would hardly seem to follow, as petitioner insists, that there is a constitutional requirement that such verdict contain findings of fact. It should also be noted that while three members of this Court dissented in part from the Speziano decision, their difference with the majority would appear to be rooted in their conviction that the Eighth Amendment mandates that the jury be the final sentencer, as opposed to any misgiving as to the procedural aspects of the jury override system. Speziano v. Florida, 468 U.S. 447, 484 (Stevens, J., joined by Brennan and Marshall, J.J., concurring in part, dissenting in part). Hildwin presents no claim based upon the Eighth Amendment.

In addition to Speziano, two more recent decisions, one of them cited by petitioner, contain holdings contrary to Hildwin's position. (Pet. at 5 [cite to McMillan v. Pennsylvania, 477 U.S. 79 (1986)]) Thus, in Cabana v. Bullock, 474 U.S. 376, 106 S.Ct. 689, 88 L.Ed.2d 704 (1986), this Court held that there was no constitutional requirement that a sentencing jury, as opposed to a sentencing judge or even an appellate court, make the requisite finding of fact that one sentenced to death had actually killed,

attempted to kill, or intended to kill, as required by Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982). Indeed, in distinguishing one of its prior decisions, Presnell v. Georgia, 439 U.S. 14, 99 S.Ct. 235, 58 L.Ed.2d 207 (1978), this Court observed,

> In reversing as well the death sentence on the ground that the Georgia Supreme Court could not find an aggravating factor on a theory on which the jury had not been instructed, the Presnell Court appeared to assume that the jury's constitutional role in determining sentence was equivalent to its role in determining guilt or innocence. This assumption, of course, is no longer tenable in light of our holding in Spaziano v. Florida, 468 U.S. ___, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984).

Bullock, 474 U.S. at ___, n. 4, 106 S.Ct. at 698, n. 4.

The scope of the holding in Spaziano was further explicated in McMillan v. Pennsylvania, 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986). In such case, the petitioner had argued that possession of a firearm should be treated as an element of the underlying criminal offense, as opposed to a sentencing consideration, thus requiring a jury finding before any enhanced sentence could be imposed. This Court rejected such argument and, in language highly pertinent to the question presented sub judice, observed,

> Having concluded that Pennsylvania may properly treat visible possession as a sentencing consideration and not an element of any offense, we need only note that there is no Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of facts. See, Spaziano v. U.S., at ___, 104 S.Ct., at ___.

McMillan, 477 U.S. at ___, 106 S.Ct. at 2420. (Emphasis supplied).

Mildwin's reliance upon the McMillan case is particularly puzzling (see Pet. at 5), since the gravamen of his asserted claim would seem to have been squarely rejected by United States Supreme Court precedent.

In conclusion, petitioner has failed to demonstrate any basis for this Court's review of the decision below. Petitioner

never presented his claim to the state circuit court as required by state procedure and he has failed to demonstrate that he received a ruling on the merits from the Supreme Court of Florida. Assuming that that court did at all consider petitioner's claim on the merits, its summary rejection of such would have been in accordance with the precedents of this Court cited above.

Mildwin's argument, however phrased, represents an unwillingness to accept, or even cite or acknowledge, this Court's holding in Spaziano, a holding to which this Court has continually adhered. Mildwin's appellate attorney would prefer a capital sentencing structure in which the jury makes express findings in aggravation. This argument was presented to the Florida Legislature in 1972 and rejected. Petitioner's continued dissatisfaction with a system which has worked for seventeen years, and which has been continually held to be constitutional during such period, presents no basis for review. The instant petition for writ of certiorari should be denied in all respects.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied in all respects.

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ATTORNEYS FOR RESPONDENT

NO. 88-6066

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

PAUL C. HILDWIN,

Petitioner,

STATE OF FLORIDA,

Respondent.

APPENDIX

ROBERT A. BUTTERWORTH
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INDEX TO APPENDIX

Thus, there was no ex post facto violation as Peters was not penalized to a greater extent by use of rule 3.701(d)(14) than he would have been had the rule not been enacted.

Accordingly, we approve the opinion of the Second District Court of Appeal. To the extent they are in conflict with this opinion, we disapprove *Cummins v. State*, 519 So.2d 718 (Fla. 5th DCA 1988) and *Green v. State*, 513 So.2d 794 (Fla. 4th DCA 1987).

It is so ordered.

EHRLICH, C.J., and OVERTON, SHAW, BARKETT and GRIMES, JJ., concur.

McDONALD, J., concurs in result only.

Paul C. HILDWIN, Appellant,

v.

STATE of Florida, Appellee.

No. 69513.

Supreme Court of Florida.

Sept. 1, 1988.

Rehearing Denied Oct. 17, 1988.

Defendant was convicted in the Circuit Court, Hernando County, L. R. Huffstetler, Jr., J., of first-degree murder. Defendant appealed. The Supreme Court held that: (1) juror, who arrived at courthouse early before first day of testimony and inadvertently saw sheriff's deputies take defendant from van, was not subject to removal for cause; (2) evidence of defendant's uncharged act of violence was admissible in penalty phase of capital case to rebut defense evidence of nonviolent nature, arrests or criminal charges, and (3) evidence established that strangulation was especially heinous, atrocious, and cruel.

Affirmed.

Barkett, J., concurred in result.

1. Jury ⇐149

Juror who arrived at courthouse early before first day of testimony and inadvertently saw sheriff's deputies take defendant from van was not subject to removal for cause.

2. Jury ⇐135

Defendant's motion to disqualify unsworn juror, who arrived at courthouse early before first day of testimony, but after voir dire, and saw sheriff's deputies take defendant from van, was challenge for cause, rather than peremptory challenge.

3. Jury ⇐149

Juror's catching inadvertent sight of defendant in handcuffs, chains, or other restraints is not so prejudicial as to require new trial.

4. Criminal Law ⇐664

Trial court improperly responded to deliberating jury's written question about factual matter when judge failed to return jury to courtroom and merely wrote response on jury's note and returned it to jury. West's F.S.A. RCrP Rule 3.410.

5. Criminal Law ⇐1174(5)

Trial judge's improper response to deliberating jury's question about factual matter when judge failed to return jury to courtroom and merely wrote answer on jury's note was harmless error; both attorneys were notified and given opportunity to make their positions known to judge. West's F.S.A. RCrP Rule 3.410.

6. Criminal Law ⇐1208.1(6)

Direct evidence of defendant's uncharged, specific act of violence was admissible in penalty phase of capital case to rebut evidence of defendant's nonviolent nature, but in absence of conviction, jury was not to be told of any arrests or criminal charges.

7. Homicide ⇐354

Evidence in penalty phase of capital case established slowness and brutal nature of strangulation death and established heinous, atrocious, and cruel nature of the murder after an abduction and rape.

8. Homicide ⇐354

Description in defendant's statement to investigator that victim's killer had cross tattooed on back was sufficient indicia of reliability due to fact that defendant had cross tattooed on back and could be considered by judge in penalty phase of capital murder prosecution despite conflicting nature of some statements.

9. Homicide ⇐354

Evidence in penalty phase of capital murder prosecution established that defendant killed victim to get money from her; defendant had no money and needed to search for pop bottles to buy gas to get home; and after victim's death defendant had victim's property and cashed forged check on her account.

James B. Gibson, Public Defender and Larry B. Henderson, Asst. Public Defender, Seventh Judicial Circuit, Daytona Beach, for appellant.

Robert A. Butterworth, Atty. Gen. and Paula C. Coffman, Asst. Atty. Gen., Daytona Beach, for appellee.

PER CURIAM.

Appellant, Paul C. Hildwin, Jr., appeals his conviction by a jury for first-degree murder and the death sentence imposed by the trial court. We have jurisdiction. Art. V, § 3(b)(1), Fla. Const.

Appellant was arrested after cashing a check purportedly written to him by one Vronsettie Cox, a forty-two-year-old woman whose body had been found in the trunk of her car, which was hidden in dense woods in Hernando County. Death was due to strangulation; she also had been raped. Evidence indicated she had been killed in a different locale from where her body was found. Her purse, from which some contents had been removed, was found in dense woods, directly on line between her car and appellant's house. A pair of semen-encrusted women's underpants was found on a laundry bag in her car, as was a sweat-stained wash rag. Analysis showed the semen and sweat came from nonsecretor (i.e., one who does not secrete blood into other bodily fluids). Appellant, a white male, was found to be a nonsecretor; there was testimony that white male nonsecretors make up eleven percent of the population.

The victim had been missing for four days when her body was found. The man she lived with, one Haverty, said she had left their home to wash clothes at a coin laundry. To do so, she had to pass a convenience store. Appellant's presence in the area of the store on the date of her disappearance had come about this way: He and two women had gone to a drive-in movie, where they had spent all their money. Returning home early in the morning, their car ran out of gas. A search of the roadside yielded pop bottles, which they redeemed for cash and bought some gasoline. However, they still could not start the car. After spending the night in the car, appellant set off on foot at 9 a.m. toward the convenience store near the coin laundry. He had no money when he left, but when he returned about an hour and a half later, he had money and a radio. Later that day, he cashed a check (which he later admitted forging) written to him on Ms. Cox's account. The teller who cashed the check remembered appellant cashing it and recalled that he was driving a car similar to the victim's.

The check led police to appellant. After arresting him the police searched his house, where they found the radio and a ring, both of which had belonged to the victim. Appellant gave several explanations for this evidence and several accounts of the killing, but at trial testified that he had been with Haverty and the victim while they were having an argument, and that when Haverty began beating and choking her, he left. He said he stole the checkbook, the ring, and the radio. Haverty had an alibi

for the time of the murder and was found to be a secretor.

Appellant made two pretrial statements that are pertinent here. One was a confession made to a cellmate. The other was a statement made to a police officer to the effect that Ms. Cox's killer had a tattoo on his back. Haverty had no such tattoo, but appellant did.

During the penalty phase the state introduced evidence that appellant previously had been convicted of violent felonies in New York and that he was on parole. Appellant's case consisted of testimony from his father, a couple that had raised him after his father had abandoned him, and a friend. The thrust of their testimony was that he had not been a violent person in their dealings with him. In rebuttal the state called a woman who testified that appellant had, five months before Ms. Cox was murdered, committed sexual battery on her. She admitted she had not reported the crime. The jury recommended death by a unanimous vote.

In his order imposing the death sentence, the trial judge found four aggravating circumstances: that appellant had previous convictions for violent felonies; that appellant was under a sentence of imprisonment at the time of the murder; that the killing was committed for pecuniary gain; and that the killing was especially heinous, atrocious, and cruel. He found nothing in mitigation.

Appellant alleges numerous errors pertaining to both guilt and sentence. We find that some merit discussion.

GUILT PHASE

Issue I: An unsworn juror's catching sight of appellant in the custody of the sheriff.

[1] Before the first day of testimony, but after voir dire, a juror arrived at the courthouse early and saw the sheriff's deputies taking appellant from the van that had transported him from the jail. Appellant told his lawyer, who made a motion to disqualify this juror. The panel had not been sworn at this time. In chambers the trial judge and defense counsel questioned the juror, who testified that he drew no inferences from seeing appellant in custody and had not talked to any other jurors about the incident. The judge denied the motion.

The central issue here is one of perception. Appellant now argues that because trial counsel had not exhausted his peremptory challenges, and because the panel had not yet been sworn, the motion to disqualify should be seen as an attempt to backstrike, which the court had no authority to deny. *See Rivera v. State*, 458 So.2d 762 (Fla.1984); *Jones v. State*, 332 So.2d 615 (Fla.1976). The state points out that defense counsel never used the words "peremptory challenge" and that this was not the nature of his effort to disqualify the juror.

[2] The defense motion was not a peremptory challenge. The defense in a criminal trial need give no reason for exercising its peremptory challenges. It is clear that this was a challenge for cause directed toward the possible taint which may have been caused by the juror seeing appellant in the custody of law enforcement. Thus, the inquiry must focus on whether the denial of the challenge was error.

[3] Our review of the record persuades us that the judge did not abuse his discretion in failing to strike the juror for cause. It is apparent from his answers to questions posed by the judge and counsel that the juror had not made much of the incident and had told none of his fellow jurors. A juror's catching inadvertent sight of a defendant in handcuffs, chains or other restraints (what the juror saw in this regard is not clear) is not so prejudicial as to require a new trial. *Heiney v. State*, 447 So.2d 210 (Fla.), *cert. denied*, 469 U.S. 920, 105 S.Ct. 303, 83 L.Ed.2d 237 (1984); *Neary v. State*, 384 So.2d 881 (Fla.1980).

Issue II: The jury being instructed by the judge by means of a note sent to the jury room.

[4] While the jury was deliberating appellant's guilt, it sent a note to the judge asking: "The distance from his home to

where the car was found?" The judge called counsel into chambers and informed both sides of the request. He told them he proposed to answer as follows: "You must rely on your memory of the testimony." After both counsel concurred with the response, the judge wrote it on the jury's note and returned it to the jury. The judge did not bring the jury into the courtroom, and there is no indication that the defendant was present in chambers. Appellant seeks the application of the per se rule of reversal established in *Ivory v. State*, 351 So.2d 26 (Fla.1977).

[5] The Florida Rules of Criminal Procedure are explicit on this point.

> After the jurors have retired to consider their verdict, if they request additional instructions or to have any testimony read to them they shall be conducted into the courtroom by the officer who has them in charge and the court may give them such additional instructions or may order such testimony read to them. Such instructions shall be given and such testimony read only after notice to the prosecuting attorney and to counsel for the defendant.

Fla.R.Crim.P. 3.410. The question the jury asked was within the scope of the rule. *See Curtis v. State*, 480 So.2d 1277 (Fla. 1985). However, unlike *Ivory* and *Curtis*, both counsel were notified and given the opportunity to make their positions known to the judge. Therefore, the only violation of the rule occurred when the judge failed to return the jury to the courtroom. Under the circumstances, this was harmless error. *See Meek v. State*, 487 So.2d 1058 (Fla. 1986); *Stano v. State*, 473 So.2d 1282 (Fla. 1985), *cert. denied*, 474 U.S. 1093, 106 S.Ct. 869, 88 L.Ed.2d 907 (1986). Clearly, the appellant suffered no prejudice.

PENALTY PHASE

Issue III. Introduction of rebuttal evidence of an uncharged crime.

[6] Appellant points out that he was not charged with sexual battery in the incident testified to by the state's witness. Therefore, he argues that testimony concerning the alleged attack was inadmissible because it is evidence of collateral crimes, and its presentation to the jury was error. The state responds that the appellant opened the door to this type of evidence by mounting a case that dealt with his nonviolent nature; this incident was relevant to rebut that claim.

At the outset, it must be remembered that there is a different standard for judging the admissibility and relevance of evidence in the penalty phase of a capital case, where the focus is substantially directed toward the defendant's character. *See* § 921.141(1), Fla. Stat. (1987). In *Elledge v. State*, 346 So.2d 998, 1001 (Fla.1977), we pointed out that

> the purpose of considering aggravating and mitigating circumstances is to engage in a character analysis of the defendant to ascertain whether the ultimate penalty is called for in his or her particular case.

Thus, evidence that would not be admissible during the guilt phase could properly be considered in the penalty phase. *Alford v. State*, 322 So.2d 533, 535 (Fla.1975), *cert. denied*, 428 U.S. 923, 96 S.Ct. 3234, 49 L.Ed.2d 1226 (1976).

Section 921.141(1), Florida Statutes (1987), relating to sentencing proceedings, provides that

> evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida.

As noted in *Alford*, "[t]here should not be a narrow application or interpretation of

the rules of evidence in the penalty hearing, whether in regard to relevance or any other matter except illegally seized evidence." 322 So.2d at 539 (citing *State v. Dixon*, 283 So.2d 1 (Fla.1973), *cert. denied and now, Hawkes v. Florida*, 416 U.S. 943, 94 S.Ct. 1956, 40 L.Ed.2d 286 (1974)).

Because no conviction was obtained, evidence such as that introduced in the instant case has been deemed inadmissible to prove the aggravating circumstance of committing a previous violent felony. *Provence v. State*, 337 So.2d 783 (Fla.1976), *cert. denied*, 431 U.S. 969, 97 S.Ct. 2929, 53 L.Ed.2d 1065 (1977). On the other hand, even where the defendant waived the mitigating circumstance of no prior criminal activity, the state was allowed to bring out the defendant's prior misconduct when the defendant opened the door by introducing evidence of his nonviolent character. *Parker v. State*, 476 So.2d 134 (Fla.1985). We hold that, during the penalty phase of a capital case, the state may rebut defense evidence of the defendant's nonviolent nature by means of direct evidence of specific acts of violence committed by the defendant provided, however, that in the absence of a conviction for any such acts, the jury shall not be told of any arrests or criminal charges arising therefrom.[1] *Cf. Squires v. State*, 450 So.2d 208 (Fla.) (in guilt phase of trial, state was permitted to rebut evidence of nonviolent character by showing that defendant had fired a deadly weapon at persons other than the victim), *cert. denied*, 469 U.S. 892, 105 S.Ct. 268, 83 L.Ed.2d 204 (1984). The court did not err in permitting the rebuttal evidence of the separate incident of sexual battery. Such evidence was more reliable than the reputation evidence which was condemned in *Drugovich v. State*, 492 So.2d 350 (Fla.1986).

Issue IV: The finding that the killing was especially heinous, atrocious, and cruel.

[7] The trial judge found that the killing was "especially wicked, evil, atrocious or cruel." To support this finding, the judge made two major points: First, the victim took several minutes to lose consciousness and would have been aware during that time of her impending doom. Second, she was brutally attacked, as evidenced by the torn bra found with the body and by the statement appellant gave to Investigator Phifer that she screamed and begged for help while she was strangled, and that her face turned blue before she lost consciousness.

Appellant argues that because there were no defensive wounds found on the body and because the other evidence of the killing, such as the time it took the victim to die, was not conclusively established, the judge engaged in mere speculation. Appellant argues that the evidence is just as consistent with the premise that the victim died during an especially physical, but nonetheless consensual, sexual encounter.

[8] We disagree that the evidence does not support the judge's finding. The killing clearly meets the test set forth in *Dixon*, which requires that the murder be accompanied by additional acts that make the crime pitiless and unnecessarily torturous to the victim. 283 So.2d at 9. We have often found that strangulation murders meet this test, and we are not prepared to say that this case, where the evidence points convincingly to a conclusion that the appellant abducted, raped, and slowly killed his victim, does not measure up to that standard.[2] This is especially true in light of the fact that appellant made his victim "acutely aware of [her] impending [death]." *Cooper v. State*, 492 So.2d 1059,

1. We hasten to add that evidence that the defendant had been a devoted family man or a good provider would not place in issue his reputation for nonviolence.

2. As did the trial judge, we rely in part on appellant's own statement to Investigator Phifer regarding the killing of Vronnette Cox. While the appellant gave several statements which were somewhat conflicting, this fact alone does not prevent a court from considering those parts of the statement that bear an indicia of reliability. *Johnson v. State*, 465 So.2d 499, 506 (Fla.), *cert. denied*, 474 U.S. 865, 106 S.Ct. 186, 88 L.Ed.2d 155 (1985). The indicia of reliability in the statement given to Investigator Phifer is that it describes the killer as having a cross tattooed on his back, as appellant does. Also, the statement was very detailed.

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1062 (Fla.1986), *cert. denied*, 479 U.S. 1101, 107 S.Ct. 1230, 94 L.Ed.2d 181 (1987). *See also Pietri v. State*, 502 So.2d 416, 421 (Fla.1986), *cert. denied*, — U.S. —, 107 S.Ct. 3277, 97 L.Ed.2d 781 (1987); *Johnson v. State*, 465 So.2d 499, 507 (Fla.), *cert. denied*, 474 U.S. 865, 106 S.Ct. 186, 88 L.Ed.2d 155 (1985). The aggravating circumstance that the killing was especially heinous, atrocious, or cruel was established by the evidence in the record beyond a reasonable doubt.

Issue V: The finding that the killing was committed for pecuniary gain.

[9] Relying on the fact that appellant admitted forging one of the victim's checks, the fact that he testified that he needed money, and the fact that he was in possession of the victim's ring and radio, the trial judge found the aggravating factor that the killing was committed for pecuniary gain.

Appellant attacks this finding, saying that while proof of possession of recently stolen property raises an inference that the possessor stole it, possession alone does not prove that the goods were stolen by the defendant. Appellant argues that the circumstantial evidence in this case does not rebut all reasonable hypotheses to the contrary.

We disagree. The evidence, while circumstantial that appellant killed Ms. Cox to get money from her, is substantial. Before he killed Ms. Cox, appellant had no money and was reduced to searching for pop bottles on the road side to scrape up enough cash to buy sufficient gas to get home. After her death he had her property and had forged and cashed a check on her account. The record supports the judge's finding beyond a reasonable doubt that the killing was committed for pecuniary gain.

REMAINING POINTS ON APPEAL

We reject without discussion Hildwin's other arguments: (1) that the trial judge should have instructed the jury as to the minimum and maximum possible penalties; (2) that a witness who had not explicitly testified to a lack of present recollection should not have been permitted to read from notes taken at the time of a conversation; (3) that the evidence was insufficient to sustain the jury's finding of guilt; (4) that the testimony of a state witness regarding his criminal record was improper; (5) that the state should have been required to furnish criminal records of all its witnesses; (6) that the death penalty was unconstitutionally imposed because the jury did not consider the elements that statutorily define the crimes for which the death penalty may be imposed; (7) that the jury instructions on aggravating and mitigating circumstances were misleading; and (8) that the sentencing order was not specific enough.

As we find no merit in any of appellant's arguments, we affirm the judgment of guilt and sentence of death.

It is so ordered.

EHRLICH, C.J., and OVERTON, McDONALD, SHAW, GRIMES and KOGAN, JJ., concur.

BARKETT, J., concurs in result only.

Joseph Anthony CICCARELLI, Petitioner,
v.
STATE of Florida, Respondent.
No. 70811.
Supreme Court of Florida
Sept. 8, 1988.

The District Court of Appeals, 509 So.2d 52, certified question. The Supreme Court, Barkett, J., held that each appellate judge evaluating assertion of harmless error in criminal appeal must independently read trial record.

EXCERPT FROM INITIAL BRIEF OF APPELLANT

IN THE SUPREME COURT OF FLORIDA

PAUL HILDWIN,

Defendant/Appellant,

vs.

STATE OF FLORIDA,

Plaintiff/Appellee.

Case NO. 69,513

APPEAL FROM THE CIRCUIT COURT
IN AND FOR HERNANDO COUNTY
FLORIDA

INITIAL BRIEF OF APPELLANT

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ATTORNEY FOR APPELLANT

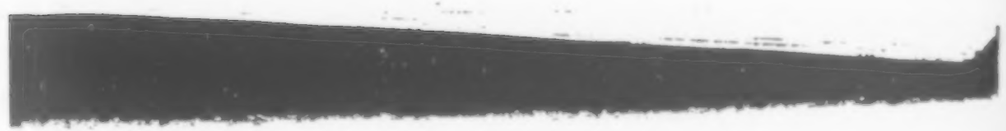
POINT IV

THE DEATH PENALTY WAS IMPOSED IN CONTRAVENTION OF THE RIGHTS TO DUE PROCESS AND A JU. TRIAL GUARANTEED BY THE C..STITUTIONS OF FLORIDA AND THE UNITED STATES, IN THAT IN RENDERING ITS VERDICT THE JURY DID NOT CONSIDER THE ELEMENTS THAT STATUTORILY DEFINE THE CRIME FOR WHICH THE DEATH PENALTY MAY BE IMPOSED.

This Court has expressly stated "[T]he aggravating circumstances of Section 921.141(6), Florida Statutes actually define those crimes, when read in conjunction with Florida Statutes 782.04(2) . . . to which the death penalty is applicable in the absence of mitigating circumstances." State v. Dixon, 283 So.2d 1, 9 (Fla. 1973). This Court has further held "that the provisions of Section 921.141 are matters of substantive law insofar as they define those capital felonies which the legislature finds deserving of the death penalty." Vaught v. State, 410 So.2d 147, 149 (Fla. 1982).

> . . . . The aggravating and mitigating circumstances enumerated in section 921.141 are substantive law. (citations omitted). "The aggravating circumstances of Fla.Stat. § 921.141(6) F.S.A., [sic] actually define those crimes—when read in conjunction with Fla.Stat. §§ 782.04-(1) and 794.01(1), F.S.A.—to which the death penalty is applicable in the absence of mitigating circumstances. As such, they must be proved beyond a reasonable doubt before being considered by judge or jury." [State v. Dixon, 283 So.2d 1, 9 (Fla. 1973)]. To the extent that section 921.141 pertains to procedural matters such as the bifurcated nature of the trial in capital cases, it has been incorporated by reference in Florida Rule of Criminal Procedure 3.780, promulgated by this Court, and is therefore properly adopted. (citation omitted).

Morgan v. State, 415 So.2d 6, 11 (Fla. 1982).



Thus, the ..orida death penalty statu. s necessarily and unequivocally establish a constitutional right to jury determination of the presence of statutory aggravating circumstances. The recognition by this Court that the statutory aggravating circumstances are substantive elements "that define those capital felonies which . . . deserve the death penalty", Vaught, supra, at 149, acknowledges that without proving these elements the state has not proved a crime that is punishable by death. See Patterson v. New York, 432 U.S. 197 (1977); Mullaney v. Wilbur, 421 U.S. 684 (1975). The "beyond a reasonable doubt" standard of proof connotes the importance of aggravating circumstances as substantive elements of the crime. See In re Winship, 397 U.S. 358 (1970).

A defendant convicted of first-degree murder in Florida has not had a jury determine facts comprising substantive elements that are required by statute to be proved beyond a reasonable doubt before imposition of the death penalty. When the verdict is rendered by the jury a defendant cannot receive the death penalty because he has not been convicted of a crime containing all the statutory elements defining an offense for which the death penalty may be imposed. He has been convicted of murder, but he has not been convicted of a crime that is necessarily punishable by death. Only after additional statutory elements are proved beyond a reasonable doubt may the state obtain the death penalty against the defendant.

The state of Oklahoma has a death penalty statute that contains substantially the same aggravating circumstances as

those found in Florida's death penalty statute. Compare Section 921.141, Florida Statute to 21 Okla. Stat. Section 701.12. Significantly, however, the procedure in Oklahoma requires unanimous jury determination of aggravating circumstances.

> In the sentencing proceeding, the statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in the charge and in writing to the jury for its deliberation. The jury, if its verdict be a unanimous recommendation of death, shall designate in writing, signed by the foreman of the jury, the statutory aggravating circumstance or circumstances which it unanimously found beyond a reasonable doubt. In non-jury cases, the judge shall make such designation. Unless at least one of the statutory aggravating circumstances enumerated in this act is so found or if it is found that any such aggravating circumstance is outweighed by the finding of one or more mitigating circumstances, the death penalty shall not be imposed. If the jury cannot, within a reasonable time, agree as to punishment, the judge shall dismiss the jury and impose a sente..ce of imprisonment for life.

21 Okla. Stat. Section 701.11. It is not herein submitted that a unanimous jury recommendation must exist in Florida prior to imposition of the death penalty by a judge in Florida. However, it is submitted that the jury must unanimously determine the presence of at least one or more aggravating circumstances as a fundamental principle of Due Process before a death sentence can be imposed.

By way of analogy, this Court is respectfully asked to consider the following hypothetical procedure: A defendant is charged with theft. A jury is instructed that if the defendant

knowingly takes or endeavors to take property belonging to another with the intent to deprive him thereof, he has committed theft. The jury returns a verdict of guilty. In a subsequent proceeding the jury is instructed that if a majority of them find that the stolen property was worth $100.00 or more, was a horse or cow, was a firearm, was a fire extinguisher, or was a will or codicil, etc. pursuant to Section 812.014(2)(b),1 - 8 Fla. Stat. (1985), it may recommend that the defendant be sentenced for a third-degree felony. A majority recommendation is made and the judge sentences the defendant to five years imprisonment. The defendant's right to jury determination of substantive elements of the crime has been circumvented. This is precisely what is happening in the death penalty context.

In State v. Overfelt, 457 So.2d 1385 (Fla. 1984) this Court stated the following:

> The question of whether an accused actually possessed a firearm while committing a felony is a factual matter properly decided by the jury. Although a trial judge may make certain findings on matters not associated with the criminal episode when rendering a sentence, it is the jury's function to be the finder of fact with regard to matters concerning the criminal episode. To allow a judge to find that an accused actually possessed a firearm when committing a felony in order to apply the enhancement or mandatory sentencing provisions of section 775.087 would be an invasion of the jury's historical function and could lead to a miscarriage of justice in such cases as this where the defendant was charged with but not convicted of a crime involving a fire-arm.

Overfelt at 1387 (emphasis added). Statutory aggravating circumstances set forth in section 921.141 involve "matters concerning

the criminal episode". Examples include whether the defendant knowingly created a great risk of death to many persons, whether the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or affecting an escape from custody, or was committed for pecuniary gain, whether the capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws, whether the capital felony was especially heinous, atrocious or cruel, or whether the capital felony was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

In McMillan v. Pennsylvania, 477 U.S.__, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986), the United States Supreme Court held that the Due Process clause of the United States Constitution does not require the state to prove visible possession of a firearm beyond a reasonable doubt since the statute neither altered the maximum penalty for the crime committed nor created a separate offense calling for a separate penalty, but operated solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it. McMillan, 91 L.Ed.2d at 77. In the context of the death penalty, however, the sanction of the death penalty is not available to the state following conviction for a capital offense; it cannot be obtained unless and until an aggravating circumstance is subsequently found to exist beyond a reasonable doubt. Thus, determination of the presence of an aggravating circumstance "ups the ante" for the defendant by raising the available punishment from that of

life imprisonment to that of the death penalty. Imposition of the death penalty is not a limitation on the trial court's discretion. Rather, it is an extension of its power. This fact effectively distinguishes McMillan.

In Florida an offense can be labeled a "capital offense" even though the death penalty is wholly unattainable following conviction for the offense. See State v. Hogan, 451 So.2d 844 (Fla. 1984). A capital offense for which the death penalty may be imposed is an offense that is sui generis.

It is respectfully submitted that because the jury did not determine the presence of the statutory aggravating circumstance that are substantive elements defining the capital offenses for which the death penalty may be imposed, the imposition of the death penalty violated the defendant's rights to due process and a jury trial guaranteed under the Florida and Federal Constitutions. Accordingly, the sentence of death must be reversed.

IN THE SUPREME COURT OF FLORIDA

PAUL CHRISTOPHER HILDWIN,

Appellant,

vs. CASE NO. 69,513

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR HERNANDO COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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POINT FOUR

APPELLANT'S SENTENCE OF DEATH WAS NOT UNCONSTITUTIONALLY IMPOSED AS A RESULT OF THE FAILURE OF APPELLANT'S JURY TO UNANIMOUSLY DETERMINE THE APPLICABILITY OF AT LEAST ONE STATUTORY AGGRAVATING CIRCUMSTANCE TO APPELLANT'S CRIME; MOREOVER, THE INSTANT CLAIM OF ERROR WAS NOT PROPERLY PRESERVED FOR APPELLATE REVIEW.

Prior to addressing the merits of the instant claim of error, appellee notes that the argument presently advanced in the initial brief of appellant contains not a single citation to the record on appeal. Although appellant presently maintains that a sentence of death was unconstitutionally imposed upon him as a result of the failure of appellant's jury to unanimously determine the applicability of at least a single statutory aggravating circumstance to appellant's crime, review of the record on appeal reveals that this issue was never raised below. This court has previously observed that, unless the constitutionality of a statute as applied to a particular set of facts is first raised at the trial court level, such an asserted claim of error has not properly been preserved for appellate review. Trushin v. State, 425 So.2d 1126 (Fla. 1982). As a consequence, appellee would urge this court to decline to review the instant claim presently presented for the first time on appeal.

Assuming arguendo that appellate review of the instant claim has not been waived by virtue of the appellant's election to raise same for the first time upon direct review of his conviction for first-degree murder and sentence of death,

appellee would point out that a similar issue has recently been presented for this court's consideration in the case of Remeta v. State, Florida Supreme Court Case No. 69,040.[15] As in Remeta, appellant presently maintains that "...the Florida death penalty statutes necessarily and unequivocally establish a constitutional right to jury determination of the presence of statutory aggravating circumstances (emphasis supplied)." See, Initial Brief of Appellant, page 33. According to appellant's theory, since the applicability of at least one statutory aggravating circumstance to the appellant's crime must be proved beyond a reasonable doubt before a sentence of death may be imposed, statutory aggravating circumstances are hence elements of capital offenses, requiring unanimous jury determination of the existence of one such element[16] in order to afford due process to the criminal defendant charged with a capital felony. For the reasons expressed below, appellee must respectfully disagree with appellant's novel interpretation of Florida capital sentencing law.

Appellant incorrectly asserts that a defendant convicted of

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[15]Oral argument in the case is presently scheduled to be heard on September 2, 1987.

[16]It is unclear from appellant's argument whether the unanimous jury determination regarding the existence of a statutory aggravating circumstance must also be unanimous with respect to the applicability of a particular circumstance. Nevertheless, for purposes of the instant argument, appellee will assume that appellant's position requires the jury's unanimous agreement that at least one, although not necessarily the same, statutory aggravating circumstance is applicable to a capital felon's crime.

first-degree murder in Florida "...cannot receive the death penalty because he has not been convicted of a crime containing all the statutory elements defining an offense for which the death penalty may be imposed." See, Initial Brief of Appellant, page 33. While the elements required to be proved to support a conviction for first-degree murder remain the same, separate sentencing criteria define those instances where the imposition of a sentence of death is appropriate. However, section 921.141, Florida Statutes (1985), does not alter the maximum penalty for the offense of first-degree murder. In this regard, "[t]his court has long held that a capital crime is one in which the death penalty is possible (emphasis supplied)." Rusaw v. State, 451 So.2d 469, 470 (Fla. 1984). Every conviction for first-degree murder in Florida involves a potential sentence of death. See, State v. Bloom, 492 So.2d 2 (Fla. 1986). As this court observed in Lightbourne v. State, 438 So.2d 380 (Fla. 1983), the aggravating circumstances ultimately required to support the imposition of a sentence of death need not be alleged in an indictment charging a defendant with a capital felony in order to confer jurisdiction on the trial court to subsequently impose a sentence of death. This result obtains because, in Florida, it is the judge and not the jury who makes the ultimate determination concerning the appropriate sentence to be imposed in a given case.

Jury unanimity in recommending the death penalty is not required under Florida's capital sentencing scheme. James v. State, 453 So.2d 786 (Fla. 1984). Moreover, a jury

recommendation, be it for death or for life imprisonment, is not binding on the trial court judge, Lusk v. State, 446 So.2d 1038 (Fla. 1984), with whom the ultimate responsibility for determining the appropriate sentence is reposed by statute. Thomas v. State, 456 So.2d 454 (Fla. 1984); Thompson v. State, 456 So.2d 444 (Fla. 1984); Clark v. State, 443 So.2d 973 (Fla. 1983); Engle v. State, 438 So.2d 803 (Fla. 1983); Hoy v. State, 353 So.2d 826 (Fla. 1977); §921.141(3), Fla. Stat. (1985).

This court has previously held that a defendant possesses no constitutional right to be sentenced by a jury. Brown v. State, 497 So.2d 2 (Fla. 1986) [citing Spaziano v. Florida, ____ U.S. ___, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984)]. "Appellant's argument that due process requires that a jury's recommendation for life or death be accompanied by reasons in writing is without merit. Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976)." Brown v. State, 473 So.2d 1260, 1271 (Fla. 1985). Although, under Florida's bifurcated system, the trial court is assisted and guided by the jury's recommendation in making its ultimate sentencing determination, the trial court's ultimate rejection of a jury's recommendation for life imprisonment does not subject a convicted capital defendant to double jeopardy. Brown v. State, 473 So.2d 1260 (Fla. 1985); Cannady v. State, 427 So.2d 723 (Fla. 1983).

It is respectfully submitted that by its unanimous recommendation of the appellant's death for the murder of Vronzettie Cox (R 1387), the jury was in unanimous agreement that at least one statutory aggravating circumstance which was not

outweighed by circumstances in mitigation was applicable to the appellant's crime. The trial court subsequently found four aggravating circumstances to have been proven beyond and to the exclusion of a reasonable doubt (R 1394-1396). Consequently, if any error whatsoever can be gleaned from the appellant's unpreserved claim concerning the unconstitutional application of Florida's capital sentencing scheme to his case, appellee would assert that any such error was harmless and should not entitle appellant to the requested resentencing. §§921.141(3) and 924.33, Fla. Stat. (1985). Appellant's sentence of death should therefore be affirmed.

EXCERPT FROM REPLY BRIEF OF APPELLANT

IN THE SUPREME COURT OF FLORIDA

PAUL C. HILDWIN, Appellant,	)	
vs.	)	CASE NO. 69,513
STATE OF FLORIDA, Appellee.	)	

APPEAL FROM THE CIRCUIT COURT
IN AND FOR HERNANDO COUNTY
FLORIDA

REPLY BRIEF OF APPELLANT

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Court's decisions or by the decisions of the United States Supreme Court.

This issue was neither identified nor discussed by this Court in the opinion deciding Peede, supra. However, in Provenzano this Court said:

> Appellant's contention that the sixth amendment right to a jury trial is violated by Florida's death penalty procedure because the trial court determines the facts anew after the jury issues its recommendation is without merit. The United States Supreme Court recently recognized the validity of the trial judge's power to impose the death sentence. Spaziano v. State, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984). Further, the trial judge does not consider the facts anew. In sentencing a defendant, a judge lists reasons to support a finding in regard to mitigating or aggravating circumstances. These reasons are taken from all the evidence in the case and any further evidence presented at the time of sentencing. Moreover, the sentence of death is not unconstitutional as applied.

Provenzano at 1185. Though identifying the basic issue, this Court's discussion is couched in terms of the Fifth Amendment proscription against double jeopardy. The citation to Spaziano supports the conclusion that the trial judge has the power to impose a death sentence over a jury recommendation of life and that jury sentencing is not constitutionally required, but Hildwin does not here contest the trial judge's power to impose the death penalty over a jury recommendation of life; neither does he contend that the jury must sentence the defendant. Rather, it is respectfully submitted that the protections afforded the defendant by a jury trial are such that the defendant has

a Sixth Amendment right to jury determination of the presence of statutory aggravating circumstances. Significantly, the United States Supreme Court in Spaziano expressly noted that such grounds were not being argued by counsel in that case; Spaziano at 458.

The same fundamental reasoning used by this Court in State v. Overfelt, 457 So.2d 1385 (Fla. 1984) should apply here. Each statute on its face does not require that the jury determine the factual basis required to impose the more severe sanction but, as acknowledged by this Court in Overfelt, the constitution requires that such facts be determined by the jury: ". . . it is the jury's function to be the finder of fact with regard to matters concerning the criminal episode." Overfelt at 1387. Procedural due process is not a static concept, but instead a dynamic process of evolution.

> For all its consequence "due process" has never been, and perhaps can never be, precisely defined. "[U]nlike some legal rules," this Court has said, due process "is not a technical conception with a fixed content unrelated to time, place and circumstances." (Citation omitted). Rather, the phrase expresses the requirement of "fundamental fairness," a requirement whose meaning can be as opaque as its importance is lofty. Applying the Due Process clause is therefore an uncertain enterprise which must discover what "fundamental fairness" consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake.

Lassiter v. Dept. of Social Services, 452 U.S. 18, 24-25, 101 S.Ct. 2153, 68 L.Ed.2d 640, 648 (1981).

In light of the far ranging consequences that this holding entails, this Court may wish to limit recognition of this right to those cases in the "direct appeal" posture pursuant to Griffin v. Kentucky, __U.S.__, 40 Cr.L. 3169 (1987). However, the sheer force of logic and precedent mandates that such recognition is necessary.

CASE NO. 88-6066

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

PAUL C. HILDWIN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CERTIFICATE OF SERVICE

I, RICHARD B. MARTELL, do hereby certify that I am a member of the Bar of the Supreme Court of the United States, and that I have served a copy of the Respondent's Brief in Opposition upon opposing counsel, by depositing same in the United States mail, first-class postage prepaid, to the following:

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All parties required to be served have been served on this 17 day of January, 1989.

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SUPREME COURT OF THE UNITED STATES

PAUL C. HILDWIN *v.* FLORIDA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

No. 88-6066. Decided May 30, 1989

PER CURIAM.

This case presents us once again with the question whether the Sixth Amendment requires a jury to specify the aggravating factors that permit the imposition of capital punishment in Florida. Petitioner, Paul C. Hildwin, Jr., was indicted for and convicted of first degree murder. Under Florida law, that offense is a capital felony punishable by death or life imprisonment. Fla. Stat. § 782.04(1)(a) (1987). Upon a defendant's conviction of a capital felony, the court conducts a separate sentencing proceeding after which the jury renders an advisory verdict. § 921.141 (Supp. 1988). The ultimate decision to impose a sentence of death, however, is made by the court after finding at least one aggravating circumstance. *Ibid.* If the court imposes a sentence of death, it must "set forth in writing its findings upon which the sentence of death is based." *Ibid.* In petitioner's case, the jury returned a unanimous advisory verdict of death and the judge imposed the death sentence. In the order imposing the death sentence, the trial judge found four aggravating circumstances: the petitioner had previous convictions for violent felonies, he was under a sentence of imprisonment at the time of the murder, the killing was committed for pecuniary gain, and the killing was especially heinous, atrocious, and cruel. The trial judge found nothing in mitigation.

On appeal to the Florida Supreme Court, petitioner argued that the Florida capital sentencing scheme violates the Sixth

Amendment because it permits the imposition of death without a specific finding by the jury that sufficient aggravating circumstances exist to qualify the defendant for capital punishment. The court rejected this argument without discussion and affirmed petitioner's conviction and sentence of death. 531 So. 2d 124 (1988).*

In *Spaziano* v. *Florida*, 468 U. S. 447 (1984), we rejected the claim that the Sixth Amendment requires a jury trial on the sentencing issue of life or death. In that case, we upheld against Sixth Amendment challenge the trial judge's imposition of a sentence of death notwithstanding that the jury had recommended a sentence of life imprisonment. We stated: "The fact that a capital sentencing is like a trial in the respects significant to the Double Jeopardy Clause . . . does not mean that it is like a trial in respects significant to the Sixth Amendment's guarantee of a jury trial." *Id.*, at 459. We did not specifically note that the death sentence may only be imposed if the judge makes a written finding of an aggravating circumstance. If the Sixth Amendment permits a judge to impose a sentence of death when the jury recommends life imprisonment, however, it follows that it does not forbid the judge from making the written findings that authorize imposition of a death sentence when the jury unanimously recommends a death sentence.

Nothing in our opinion in *McMillan* v. *Pennsylvania*, 477 U. S. 79 (1986), suggests otherwise. We upheld a Pennsylvania statute that required the sentencing judge to impose a mandatory minimum sentence if the judge found by a preponderance of the evidence that the defendant visibly possessed

*Petitioner did not present this issue to the trial court, but raised it for the first time in the Florida Supreme Court. Respondent therefore argues that the decision below rests on an adequate and independent state ground. The Florida Supreme Court, however, did not rest its decision on this procedural argument, finding instead that there was "no merit" to petitioner's claim. 531 So. 2d, at 129. In these circumstances, we have jurisdiction to reach the merits. See *Caldwell* v. *Mississippi*, 472 U. S. 320, 327 (1985).

a firearm. We noted that the finding under Pennsylania law "neither alters the maximum penalty for the crime committed nor creates a separate offense calling for a separate penalty; it operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it." *Id.*, at 87–88. Thus we concluded that the requirement that the findings be made by a judge rather than the jury did not violate the Sixth Amendment because "there is no Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of fact." *Id.*, at 93. Like the visible possession of a firearm in *McMillan*, the existence of an aggravating factor here is not an element of the offense but instead is "a sentencing factor that comes into play only after the defendant has been found guilty." *Id.*, at 86. Accordingly, the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury.

The motion for leave to proceed in forma pauperis and the petition for a writ of certiorari are granted and the judgment of the Supreme Court of Florida is

Affirmed.

(5)

SUPREME COURT OF THE UNITED STATES

PAUL C. HILDWIN *v.* FLORIDA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

No. 88-6066. Decided May 30, 1989

JUSTICE BRENNAN, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976) (BRENNAN, J., dissenting), I would vacate the death sentence in this case.

SUPREME COURT OF THE UNITED STATES

PAUL C. HILDWIN *v.* FLORIDA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

No. 88–6066. Decided May 30, 1989

JUSTICE MARSHALL, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976), (MARSHALL, J., dissenting), I would grant the petition for certiorari and vacate the death sentence in this case.

Even if I did not hold this view, I would dissent from the Court's decision today to affirm summarily the decision below. I continue to believe that summary dispositions deprive litigants of a fair opportunity to be heard on the merits and create a significant risk that the Court is rendering an erroneous or ill-advised decision that may confuse the lower courts. See *Pennsylvania* v. *Bruder*, —— U. S. ——, —— (1988) (MARSHALL, J., dissenting); *Rhodes* v. *Stewart*, —— U. S. ——, ——(1988) (MARSHALL, J., dissenting); *Buchanan* v. *Stanships*, 485 U. S. ——, —— (1988) (MARSHALL, J., dissenting); *Commissioner* v. *McCoy*, 484 U. S. ——, —— (1987) (MARSHALL, J., dissenting). This risk of error is particularly unacceptable in capital cases where a man's life is at stake. I dissent.